













**THE  
LAWS OF ENGLAND.**



**VOLUME XIX**



# THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE  
LAW OF ENGLAND

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN  
1885 86 1886 92 and 1895—1905

AND OTHER LAWYERS

VOLUME XIX

LIEN

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LITERARY AND SCIENTIFIC INSTITUTIONS

LOAN SOCIETIES

LOCAL GOVERNMENT

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NOTE.—For Criminal Law generally and the procedure upon inquiry into indictable offences see title CRIMINAL LAW AND PROCEDURE, Vol IX pp 229 *et seq*. For particular offences triable summarily reference is directed to the titles throughout the work which deal with the subject matter of the offences.—ENDS

## MAIN ROADS

*See HIGHWAYS, STREETS, AND BRIDGES*

## MAINTENANCE

*See* **BASTARDY, HUSBAND AND WIFE, INFANTS AND CHILDREN,  
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| <i>Injunction</i>                             | - | - | -                | INJUNCTION                             |  |
| <i>Juries</i>                                 | - | - | -                | JURIES                                 |  |
| <i>Jurisdiction</i>                           | - | - | -                | COUNTY COURTS                          | COURTS PRACTICE AND PROCEDURE  |
| <i>Justices</i>                               | - | - | -                | MAGISTRATES                            |  |
| <i>Libel</i>                                  | - | - | -                | LIBEL AND SLANDER                      |  |
| <i>Magistrates</i>                            | - | - | -                | MAGISTRATES                            |  |
| <i>Malice</i>                                 | - | - | -                | DAMAGES                                | LIBEL AND SLANDER TORT   |
| <i>Malicious Injury to Property</i>           | - | - | -                | CRIMINAL LAW AND PROCEDURE             |  |
| <i>Mandamus</i>                               | - | - | -                | CROWN PRACTICE                         |  |
| <i>Misrepresentation</i>                      | - | - | -                | MISREPRESENTATION AND FRAUD            |  |
| <i>Mistake</i>                                | - | - | -                | EQUITY MISTAKE                         |  |
| <i>Negligence</i>                             | - | - | -                | NEGLIGENCE                             |  |
| <i>Practice</i>                               | - | - | -                | ADMIRALTY                              | COUNTY COURTS EXECUTORS AND ADMINISTRATORS HUSBAND AND WIFE PRACTICE AND PROCEDURE |
| <i>Public Authorities and Public Officers</i> | - | - | -                | PUBLIC AUTHORITIES AND PUBLIC OFFICERS |  |
| <i>Search Warrants</i>                        | - | - | -                | CRIMINAL LAW AND PROCEDURE             |  |
| <i>Sheriffs</i>                               | - | - | -                | SHERIFFS AND BAILIFFS                  |  |
| <i>Slander</i>                                | - | - | -                | LIBEL AND SLANDER                      |  |
| <i>Tort Principles of</i>                     | - | - | -                | TORT                                   |  |
| <i>Trespass</i>                               | - | - | -                | TRESPASS                               |  |
| <i>Trustees in Bankruptcy</i>                 | - | - | -                | BANKRUPTCY AND INSOLVENCY              |  |

## MALTA

*See* DEPENDENCIES AND COLONIES

## MANDAMUS

*See* CROWN PRACTICE, MAGISTRATES

## MANOR.

*See* COPYHOLDS, REAL PROPERTY AND CHATTELS REAL.

## MANORIAL COURTS

*See* COPYHOLDS, COURTS

## MANSLAUGHTER

*See* CRIMINAL LAW AND PROCEDURE.

MAP

*See* EVIDENCE

MARGARINE

*See* FOOD AND DRUGS

MARINE INSURANCE

*See* INSURANCE SHIPPING AND NAVIGATION

MARINE STORES

*See* CRIMINAL LAW AND PROCEDURE TRADE AND TRADE UNIONS

MARINERS

*See* CRIMINAL LAW AND PROCEDURE FISHERIES MASTER AND  
SERVANT SHIPPING AND NAVIGATION

MARITIME COURTS

*See* ADMIRALTY, COURTS, SHIPPING AND NAVIGATION

MARITIME LIEN

*See* LIEN, SHIPPING AND NAVIGATION

MARKET GARDEN

*See* AGRICULTURE

MARKET OVERT

*See* CRIMINAL LAW AND PROCEDURE MARKETS AND FAIRS, SALE  
OF GOODS

# ABBREVIATIONS

## USED IN THIS WORK

|                                |   |
|--------------------------------|---|
| <b>A. C</b> (preceded by date) | <b>Law Reports Appeal Cases House of Lords since 1890</b> ( <i>e.g.</i> [1891] A. C.) |
| <b>A. G</b>                    | <b>Attorney General</b>   |
| <b>Act</b>                     | <b>Acton's Reports Prize Causes 2 vols 1809—1811</b>                                  |
| <b>Ad. &amp; El</b>            | <b>Adolphus and Ellis's Reports King's Bench and Queen's Bench 12 vols 1834—1842</b>  |
| <b>Adam</b>                    | <b>Adam's Justiciary Reports (Scotland) 1893—(current)</b>                            |
| <b>Add</b>                     | <b>Addams Ecclesiastical Reports 3 vols 1822—1826</b>                                 |
| <b>Adv. Gen.</b>               | <b>Advocate General</b>   |
| <b>Alc. &amp; N</b>            | <b>Alcock and Napier's Reports King's Bench (Ireland) 1 vol 1813—1833</b>             |
| <b>Alc. Reg. Cas</b>           | <b>Alcock's Registry Cases (Ireland) 1 vol 1832—1841</b>                              |
| <b>Aleyn</b>                   | <b>Aleyn's Reports King's Bench fol 1 vol 1646—1649</b>                               |
| <b>Amb</b>                     | <b>Ambler's Reports Chancery 2 vols, 1720—1783</b>                                    |
| <b>And</b>                     | <b>Anderson's Reports Common Pleas fol 2 parts in one vol 1535—1605</b>               |
| <b>Andr</b>                    | <b>Andrews Reports King's Bench fol, 1 vol 1737—1740</b>                              |
| <b>Anon</b>                    | <b>Anonymous</b>  |
| <b>Anst</b>                    | <b>Anstruther's Reports Exchequer 3 vols. 1792—1797</b>                               |
| <b>App. Cas</b>                | <b>Law Reports Appeal Cases House of Lords 15 vols 1875—1890</b>                      |
| <b>Arkley</b>                  | <b>Arkley's Justiciary Reports (Scotland), 1 vol 1846—1848</b>                        |
| <b>Arm. M. &amp; O</b>         | <b>Armstrong Macartney and Ogle's Civil and Criminal Reports (Ireland) 1840—1842</b>  |
| <b>Arn</b>                     | <b>Arnold's Reports Common Pleas, 2 vols, 1838—1839</b>                               |
| <b>Arn. &amp; H</b>            | <b>Arnold and Hodges Reports Queen's Bench 1 vol 1840—1841</b>                        |
| <b>Asp. M. L. O</b>            | <b>Aspinall's Maritime Law Cases 1870—(current)</b>                                   |
| <b>Atk</b>                     | <b>Ashburner's Principles of Equity 1902</b>  |
| <b>Ayl. Pan</b>                | <b>Atkyns Reports Chancery 3 vols 1736—1754</b>                                       |
| <b>Ayl. Par</b>                | <b>Ayliffe's New Pandect of Roman Civil Law</b>                                       |
|                                | <b>Ayliffe's Parergon Juris Canonici Anglicani</b>                                    |
| <b>B. &amp; Ad</b>             | <b>Barnewall and Adolphus Reports King's Bench, 5 vols 1830—1834</b>                  |
| <b>B. &amp; Ald</b>            | <b>Barnewall and Alderson's Reports, King's Bench, 5 vols 1817—1822</b>               |
| <b>B. &amp; O</b>              | <b>Barnewall and Cresswell's Reports King's Bench, 10 vols 1822—1830</b>              |
| <b>B. &amp; S</b>              | <b>Best and Smith's Reports Queen's Bench 10 vols., 1861—1870</b>                     |
| <b>Bac. Abr</b>                | <b>Bacon's Abridgment</b>   |
| <b>Bail Ct. Cas</b>            | <b>Bail Court Cases (Lowndes and Maxwell) 1 vol, 1852—1854</b>                        |
| <b>Bald</b>                    | <b>Baldon's Select Cases in Chancery (Selden Society Vol. X)</b>                      |
| <b>Ball &amp; B</b>            | <b>Ball and Beatty's Reports Chancery (Ireland) 2 vols. 1807—1814</b>                 |
| <b>Bankr. &amp; Ins. R</b>     | <b>Bankruptcy and Insolvency Reports, 2 vols. 1853—1855</b>                           |

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| Bar & Arn           | Barron & Arnold's Election Cases 1 vol 1843—1846   |
| Bar & Aust          | Barron & Austin's Election Cases 1 vol, 1842   |
| Barn (CH)           | Barnardiston's Reports Chancery fol 1 vol, 1740—1741   |
| Barn (K B)          | Barnardiston's Reports King's Bench, fol, 2 vols, 1726—1734                                      |
| Barnes              | Barnes Notes of Cases of Practice, Common Pleas 1 vol, 1732—1760                                 |
| Batt                | Batty's Reports King's Bench (Ireland) 1 vol, 1825—1826  |
| Beat                | Beatty's Reports Chancery (Ireland) 1 vol, 1813—1830   |
| Beav                | Beavan's Reports Rolls Court 36 vols 1838—1866   |
| Beav & Wal          | Beavan and Walford's Railway Parliamentary Cases 1 vol 1846                                      |
| Beaw                | Beawes's Lex Mercatoria  |
| Bellewe             | Bellewe's Cases temp Richard II King's Bench 1 vol   |
| Bell C C            | T Bell's Crown Cases Reserved 1 vol 1558—1860  |
| Bell Ct of Sess     | R Bell's Decisions Court of Session (Scotland) 1 vol, 1790—1792                                  |
| Bell Ct of Sess fol | R Bell's Decisions Court of Session (Scotland) fol 1 vol 1704—1795                               |
| Bell Dict Dec       | S S Bell's Dictionary of Decisions Court of Session (Scotland) 2 vols 1808—1833                  |
| Bell Sc App         | S S Bell's Scotch Appeals House of Lords 7 vols 1842—1850  |
| Belt & Sup          | Belt's Supplement to Vesey Sen Chancery 1 vol 1746—1756  |
| Benl                | Benloe's (or Bendloe's) Reports King's Bench and Common Pleas fol 1 vol 1515—1627                |
| Ben & D             | Benloe and Dalson's Reports Common Pleas fol 1 vol 1377—1579                                     |
| Bing                | Bingham's Reports Common Pleas 10 vols 1822—1834   |
| Bing (N O)          | Bingham's New Cases Common Pleas 6 vols, 1834—1840   |
| Bitt Prac Cas       | Bittleston's Practice Cases in Chambers under the Judicature Acts 1873 and 1875 1 vol 1870—1876  |
| Bitt Rep in Ch.     | Bittleston's Reports in Chambers (Queen's Bench Division) 1 vol 1883—1884                        |
| Bl Com              | Blackstone's Commentaries  |
| Bl D & Osb          | Blackham Dundas and Osborne's Reports Practice and Nisi Prius (Ireland) 1 vol 1846—1848          |
| Bli                 | Bligh's Reports House of Lords 4 vols 1819—1821  |
| Bli (N S)           | Bligh's Reports House of Lords New Series 11 vols 1827—1837                                      |
| Bos & P             | Bosanquet and Fuller's Reports Common Pleas 3 vols 1796—1804                                     |
| Bos & P (N S)       | Bosanquet and Fuller's New Reports Common Pleas 2 vols 1804—1807                                 |
| Braet.              | Bracton De Legibus et Consuetudinibus Angliæ   |
| Bro Abr             | Sir J Brooke's Abridgment  |
| Bro C C             | W Brown's Chancery Reports, 4 vols, 1778—1794  |
| Bro Ecc Rep         | W G Brooke's Ecclesiastical Reports Privy Council, 1 vol 1850—1872                               |
| Bro (N O)           | Sir R Brooke's New Cases 1 vol 1515—1558   |
| Bro Parl Cas        | J Brown's Cases in Parliament 8 vols 1702—1800   |
| Bro Supp to Mor     | M P Brown's Supplement to Morison's Dictionary of Decisions Court of Session (Scotland), 5 vols. |
| Bro. Synop          | M P Brown's Synopsis of Decisions Court of Session (Scotland) 4 vols 1532—1827                   |
| Brodr. & Bing       | Broderip and Bingham's Reports Common Pleas, 3 vols. 1819—1822                                   |

## ABBREVIATIONS

|                        |  |
|------------------------|--|
| Brod & F               | Brodick and Fremantle's Ecclesiastical Reports, Privy Council 1 vol, 1705—1864 |
| Broun                  | Broun's Justiciary Reports (Scotland), 2 vols, 1842—1845                       |
| Brown & Lush.          | Browning and Lushington's Reports, Admiralty, 1 vol, 1863—1866                 |
| Brownl                 | Brownlow and Goldesborough's Reports Common Pleas 2 parts 1569—1624            |
| Bruce                  | Bruce's Decisions Court of Session (Scotland) 1714—1715                        |
| Buchan                 | Buchanan's Reports Court of Session and Justiciary (Scotland) 1806—1813        |
| Buck                   | Buck's Cases in Bankruptcy 1 vol 1816—1820                                     |
| Bulat                  | Bulstrode's Reports Kings Bench fol 3 parts in 1 vol 1610—1626                 |
| Bunb                   | Bunbury's Reports Exchequer fol 1 vol 1713—1741                                |
| Burr                   | Burrow's Reports Kings Bench 5 vols 1756—1772                                  |
| Burr S O               | Burrows Settlement Cases Kings Bench 1 vol 1733—1776                           |
| Burrell                | Burrell's Reports Admiralty ed by Marsden 1 vol 1648—1840                      |
| O A.                   | Court of Appeal  |
| O B                    | Common Bench Reports 18 vols 1845—1856   |
| C L (N s)              | Common Bench Reports New Series 20 vols, 1856—1865                             |
| O C A                  | Court of Criminal Appeal   |
| O O Ct Cas             | Central Criminal Court Cases (Sessions Papers) 1834—(current)                  |
| O L R.                 | Common Law Reports 3 vols 1853—1855  |
| O P D                  | Law Reports Common Pleas Division 5 vols 1875—1880                             |
| O & P                  | Carrington and Payne's Reports Nisi Prius 9 vols, 1823—1841                    |
| Cab & El               | Cababe and Ellis's Reports Queen's Bench Division 1 vol 1882—1885              |
| Cald Mag Cas           | Caldecott's Magistrates Cases 1 vol 1777—1786                                  |
| Calth                  | Calthrop's City of London Cases, Kings Bench 1 vol. 1609—1618                  |
| Camp                   | Campbell's Reports Nisi Prius 4 vols, 1807—1816                                |
| Carp Pat Cas           | Carpmael's Patent Cases 2 vols 1602—1842                                       |
| Car & Kir              | Carrington and Kirwan's Reports Nisi Prius 3 vols., 1843—1853                  |
| Car & M                | Carrington and Marshman's Reports Nisi Prius 1 vol 1841—1843                   |
| Cart                   | Carter's Reports Common Pleas fol 1 vol 1664—1673                              |
| Carth                  | Carthew's Reports, Kings Bench fol 1 vol, 1687—1700                            |
| Cary                   | Cary's Reports Chancery 1 vol  |
| Cas in Ch              | Cases in Chancery fol 3 parts, 1660—1697                                       |
| Cas Pract K B          | Cases of Practice Kings Bench 1 vol 1655—1775*                                 |
| Cas Sett               | Cases of Settlements and Removals, 1 vol 1689—1727                             |
| Cas temp Finch         | Cases temp Finch Chancery fol, 1 vol. 1673—1680                                |
| Cas temp King          | Select Cases temp King Chancery fol. 1 vol 1724—1733                           |
| Cas temp Talb          | Cases in Equity temp Talbot fol 1 vol 1730—1737                                |
| Ch. (preceded by date) | Law Reports, Chancery Division since 1890 (2 g [1891] 1 Ch)                    |
| Ch App                 | Law Reports, Chancery Appeals 10 vols., 1865—1875                              |
| Ch D                   | Law Reports, Chancery Division 45 vols. 1875—1890                              |
| Ch Rob                 | Christopher Roberson's Reports Admiralty, 6 vols., 1798—1808                   |



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| Char Pr Cas      | Charley's New Practice Reports, 3 vols, 1875—1876   |
| Char Cham Cas    | Charley's Chamber Cases 1 vol 1875—1876   |
| Chit             | Chitty's Practice Reports Kings Bench, 2 vols 1770—1822                                       |
| Cl & Fin.        | Clark and Finnelly's Reports House of Lords 12 vols 1831—1846                                 |
| Clay             | Clayton's Reports and Pleas of Assises at Yorke 1 vol 1631—1650                               |
| Clif & Rick      | Clifford and Rickards Locus Standi Reports, 3 vols. 1873—1884                                 |
| Clif & Steph     | Clifford and Stephens Locus Standi Reports, 2 vols 1867—1872                                  |
| Cockb. & Rowe    | Cockburn and Rowes Election Cases 1 vol 1833  |
| Co Ent           | Coke's Institutes   |
| Co Inst          | Coke's Institutes   |
| Co Litt          | Coke on Littleton (1 Inst.)   |
| Co Rep           | Coke's Reports 13 parts 1672—1616   |
| Coll             | Colliver's Reports Chancery 2 vols 1844—1846  |
| Coll Jund        | Collectanea Juridica 2 vols   |
| Colles           | Colles Cases in Parliament 1 vol 1697—1713  |
| Colt             | Coltman's Registration Cases 1 vol 1879—1880  |
| Com              | Comyns Reports Kings Bench Common Pleas and Exchequer, fol 2 vols, 1690—1740                  |
| Com Cas          | Commercial Cases 1890—(current)   |
| Com Dig          | Comyns Digest   |
| Comb             | Comberbach's Reports Kings Bench fol 1 vol 1680—1698  |
| Conr. & Law      | Connor and Lawson's Reports, Chancery (Ireland) 2 vols 1541—1843                              |
| Cooke & Al       | Cooke and Alcock's Reports Kings Bench (Ireland) 1 vol 1833—1834                              |
| Cooke Pr Cas     | Cooke's Practice Reports Common Pleas 1 vol 1706—1747   |
| Cooke Pr Reg     | Cooke's Practical Register of the Common Pleas 1 vol 1702—1742                                |
| Coop G           | G Cooper's Reports Chancery 1 vol 1792—1815   |
| Coop Pr Cas      | C P Cooper's Reports Chancery Practice 1 vol 1837—1838  |
| Coop temp Brough | C P Cooper's Cases temp Brougham Chancery 1 vol 1833—1834                                     |
| Coop temp Cott   | C P Cooper's Cases temp Cottenham Chancery 2 vols 1846—1848 (and miscellaneous earlier cases) |
| Corb & D         | Corbett and Daniell's Election Cases 1 vol 1819   |
| Couper           | Couper's Justiciary Reports (Scotland) 5 vols 1863—1885                                       |
| Cowp             | Cowper's Reports Kings Bench 2 vols 1774—1778   |
| Cox C C          | E W Cox's Criminal Law Cases, 1843—(current)  |
| Cox & Atk        | Cox and Atkinson's Registration Appeal Cases 1 vol 1843—1846                                  |
| Cox Eq Cas       | S C Cox's Equity Cases 2 vols 1745—1797   |
| Cox, M & H       | Cox Macrae and Hertslet's County Courts Cases and Appeals Vol. I. 1846—1852                   |
| Cr & J           | Crompton and Jervis's Reports Exchequer 2 vols. 1830—1832                                     |
| Cr & M           | Crompton and Meeson's Reports Exchequer, 2 vols 1832—1834                                     |
| Cr M & R         | Crompton Meeson and Roscoe's Reports, Exchequer 2 vols 1834—1835                              |
| Cr & Ph.         | Craig and Phillips' Reports Chancery, 1 vol 1840—1841   |
| Cr App Rep       | Cohen's Criminal Appeal Reports 1909 (current)  |
| Craw & D         | Crawford and Dix's Circuit Cases (Ireland) 3 vols., 1838—1846                                 |

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|-------------------|---|
| Craw & D Abr C    | Crawford and Dix's Abridged Cases (Ireland), 1 vol 1837—1838                        |
| Cress Insolv Cas  | Cresswell's Insolvency Cases, 1 vol 1827—1829                                       |
| Cripps Church Cas | Cripps Church and Clergy Cases 2 parts 1847—1850                                    |
| Cro Car           | Croke's Reports <i>temp</i> Charles I King's Bench and Common Pleas 1 vol 1620—1641 |
| Cro Eliz          | Croke's Reports <i>temp</i> Elizabeth King's Bench and Common Pleas 1 vol 1582—1603 |
| Cro Jac           | Croke's Reports <i>temp</i> James I King's Bench and Common Pleas 1 vol 1603—1625   |
| Cru Dig           | Cruise's Digest of the Law of Real Property 7 vols                                  |
| Cunn              | Cunningham's Reports King's Bench fol 1 vol 1734—1730                               |
| Curt              | Curteis Ecclesiastical Reports 3 vols 1834—1844                                     |
| Dalr              | Dalrymple's Decisions Court of Session (Scotland) fol 1 vol 1698—1720               |
| Dan               | Daniell's Reports, Exchequer in Equity 1 vol 1817—1823                              |
| Dan & Ll          | Danson and Lloyd's Mercantile Cases 1 vol 1828—1829                                 |
| Dav & Mer         | Davison and Merivale's Reports, Queen's Bench 1 vol 1843—1844                       |
| Dav Pat Cas       | Davies Patent Cases 1 vol 1780—1816   |
| Dav Ir            | Davys (or Davies or Davys) Reports (Ireland) 1 vol 1604—1611                        |
| Day               | Day's Election Cases 1 vol 1892—1893  |
| Dea & Sw          | Deane and Swabey's Ecclesiastical Reports 2 vol 1855—1857                           |
| Deac              | Deacon's Reports Bankruptcy 4 vols 1834—1840  |
| Deac & Ch         | Deacon and Chitty's Reports Bankruptcy 4 vols, 1837—1830                            |
| Dears & B         | Dearsly and Bell's Crown Cases Reserved 1 vol 1806—1808                             |
| Dears C C         | Dearsly's Crown Cases Reserved 1 vol 1852—1856                                      |
| Deus & And        | Deas and Anderson's Decisions (Scotland) 0 vols 1829—1832                           |
| De G              | De Gex's Reports Bankruptcy 1 vol 1844—1848   |
| De G F & J        | De Gex Fisher and Jones's Reports Chancery 4 vols 1809—1862                         |
| De G & J          | De Gex and Jones's Reports Chancery 4 vols 1857—1859                                |
| De G J & Sm       | De Gex Jones and Smith's Reports Chancery 4 vols 1862—1860                          |
| De G M & G        | De Gex Macnaghten and Gordon's Reports Chancery 8 vols 1851—1807                    |
| De G & Sm         | De Gex and Smale's Reports Chancery 5 vols 1846—1802                                |
| Delane            | Delane's Decisions Revision Courts 1 vol 1832—1830                                  |
| Den               | Denison's Crown Cases Reserved 2 vols 1844—1852                                     |
| Dick              | Dickens Reports Chancery 2 vols 1559—1798   |
| Dig               | Justinian's Digest or Pandects  |
| Dirl              | Dirlton's Decisions Court of Session (Scotland) fol 1 vol 1665—1677                 |
| Dods              | Dodson's Reports Admiralty 2 vols 1811—1822   |
| Donnelly          | Donnelly's Reports, Chancery 1 vol 1836—1837  |
| Doug El Cas       | Douglas Election Cases 4 vols, 1774—1776  |
| Doug (K B)        | Douglas Reports King's Bench 4 vols 1778—1785                                       |
| Dow               | Dow's Reports House of Lords, 6 vols, 1812—1818                                     |
| Dow & Cl          | Dow and Clark's Reports House of Lords, 2 vols, 1827—1832                           |
| Dow & L.          | Dowling and Lowndes' Practice Reports, 7 vols, 1843—1849                            |

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|-----------------------|---|
| Dow & Ry (κ β)        | Dowling and Ryland's Reports King's Bench, 9 vols, 1822—1827  |
| Dow & Ry (μ σ)        | Dowling and Ryland's Magistrates Cases 4 vols 1822—1827   |
| Dow & Ry (π ρ)        | Dowling and Ryland's Reports Nisi Prius 1 part 1822—1823  |
| Dowl                  | Dowling's Practice Reports 9 vols 1830—1841   |
| Dowl (π σ)            | Dowling's Practice Reports New Series 2 vols 1841—1843  |
| Dr & Wal              | Drury and Walsh's Reports Chancery (Ireland) 2 vols 1837—1841   |
| Dr & War              | Drury and Warren's Reports Chancery (Ireland), 4 vols. 1841—1843  |
| Drew                  | Drewry's Reports Chancery 4 vols 1852—1859  |
| Drew & Sm             | Drewry and Smale's Reports Chancery 2 vols 1859—1865  |
| Drinkwater            | Drinkwater's Reports Common Pleas 1 vol 1839  |
| Drury temp Nap        | Drury's Reports temp Napier Chancery (Ireland) 1 vol 1858—1859  |
| Drury temp Sug        | Drury's Reports temp Sugden, Chancery (Ireland) 1 vol 1841—1844   |
| Dugd Orig             | Dugdale's Origines Juridicales  |
| Dunl (Ot of Sess)     | Dunlop Court of Session Cases (Scotland) 2nd series 24 vols 1838—1862   |
| Dunning               | Dunning's Reports King's Bench 1 vol. 1753—1754   |
| Duise                 | Duise's Decisions Court of Session (Scotland) fol. 1 vol 1621—1642  |
| Dyer                  | Dyer's Reports King's Bench 3 vols 1513—1581  |
| E. & B                | Ellis and Blackburn's Reports Queen's Bench 8 vols 1852—1858  |
| E & E                 | Ellis and Ellis's Reports Queen's Bench 3 vols 1858—1861  |
| E B & E               | Ellis Blackburn and Ellis's Reports, Queen's Bench 1 vol 1858—1860  |
| Eag & Y               | Eagle and Young's Tithe Cases 4 vols 1223—1825  |
| East                  | East's Reports King's Bench 16 vols 1800—1812   |
| East P O              | East's Pleas of the Crown   |
| Ecc & Ad              | Spinks Ecclesiastical and Admiralty Reports 2 vols 1853—1855  |
| Eden                  | Eden's Reports Chancery 2 vols 1757—1766  |
| Edgar                 | Edgar's Decisions Court of Session (Scotland) fol. 1724—1725  |
| Edw                   | Edwards Reports Admiralty 1 vol 1808—1812   |
| Elchies               | Elchies Decisions Court of Session (Scotland) 2 vols 1733—1754  |
| Eng Pr Cas            | Roscoe's English Prize Cases 2 vols 1745—1858   |
| Eq Cas Abr            | Abridgment of Cases in Equity fol 2 vols 1667—1744  |
| Rep                   | Equity Reports 3 vols 1853—1855   |
| sp                    | Espinasse's Reports, Nisi Prius 6 vols, 1793—1810   |
| Exch                  | Exchequer Reports (Welsby Hurlstone and Gordon), 11 vols, 1847—1856   |
| Ex. D                 | Law Reports Exchequer Division, 5 vols 1875—1880  |
| F & F                 | Foster and Finlason's Reports Nisi Prius 4 vols 1856—1867   |
| F (Ot of Sess.)       | Fraser, Court of Session Cases (Scotland) 5th series, 1898—1906   |
| Fac. Coll (with date) | Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol, 1st and 2nd series 21 vols 1752—1825 |

# ABBREVIATIONS

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|                              |  |
|------------------------------|--|
| Fac. Coll. (N S) (with date) | Faculty of Advocates Collection of Decisions Court of Session (Scotland) New Series, 16 vols, 1820—1841                      |
| Falc.                        | Falconer's Decisions Court of Session (Scotland) 2 vols. fol 1744—1761   |
| Falc & Fitz                  | Falconer and Fitzherbert's Election Cases, 1 vol 1830—1838   |
| Ferg                         | Ferguson's Consistorial Decisions (Scotland) 1 vol 1811—1817   |
| Fitz G                       | Fitz Gibbons Reports, King's Bench, fol 1 vol 1728—1731  |
| Fitz Nat Brev                | Fitzherbert's Natura Brevium   |
| Fl & K                       | Flanagan and Kelly's Reports Rolls Court (Ireland) 1 vol 1840—1842   |
| Fonbl                        | Fonblanque's Reports, Bankruptcy, 2 parts 1819—1822  |
| For                          | Forrest's Reports Exchequer 1 vol 1800—1801  |
| Forb                         | Forbes Decisions Court of Session (Scotland) fol 1 vol 1705—1713   |
| Fort De Laud                 | Fortescue De Laudibus Legum Angliæ   |
| Fortes Rep                   | Fortescue's Reports fol 1 vol 1692—1736  |
| Fost                         | Foster's Crown Cases 1 vol 1743—1760   |
| Fount                        | Fountainhall's Decisions Court of Session (Scotland) fol 2 vols 1678—1712  |
| Fox & S Ir                   | M C Fox and F B C Smith's Reports King's Bench (Ireland) 2 vols 1822—1825  |
| Fox & S Reg                  | J S Fox and C L Smith's Registration Cases 1 vol 1886—1890   |
| Freem (OH)                   | Freeman's Reports Chancery 1 vol 1660—1706   |
| Freem (K B)                  | Freeman's Reports King's Bench and Common Pleas 1 vol 1670—1704  |
| Gal & Dav                    | Gale and Davison's Reports Queen's Bench 3 vols 1841—1843  |
| Gale                         | Gale's Reports Exchequer 2 vols 1835—1836  |
| Gib Cod                      | Gibson's Codex Juris Ecclesiastici Anglicani   |
| Giff                         | Giffard's Reports Chancery 5 vols 1801—1865  |
| Gilb                         | Gilbert's Cases in Law and Equity 1 vol, 1713—1714   |
| Gilb C P                     | Gilbert's History and Practice of the Court of Common Pleas  |
| Gilb (OH)                    | Gilbert's Reports Chancery and Exchequer fol 1 vol 1706—1726   |
| Gilm & F                     | Gilmour and Falconer's Decisions Court of Session (Scotland) 2 parts Part I (Gilmour) 1661—1686 Part II (Falconer) 1681—1686 |
| Gl & J                       | Glyn and Jameson's Reports Bankruptcy 2 vols 1819—1828   |
| Glanv                        | Glanville De Legibus et Consuetudinibus Regni Angliæ   |
| Glanv El Cas                 | Glanville's Election Cases 1 vol 1623—1624   |
| Glascock                     | Glascock's Reports (Ireland) 1 vol 1831—1832   |
| Godb                         | Godbolt's Reports, King's Bench Common Pleas and Exchequer 1 vol 1674—1637   |
| Gouldsb                      | Gouldsbrough's Reports Queen's Bench and King's Bench 1 vol 1686—1601  |
| Gow                          | Gow's Reports Nisi Prius 1 vol 1818—1820   |
| Gwill                        | Gwillim's Tithe Cases, 4 vols, 1224—1824   |
| H & C                        | Hurlstone and Coltman's Reports Exchequer, 4 vols 1862—1866  |
| H & N                        | Hurlstone and Norman's Reports, Exchequer 7 vols 1856—1862   |

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| H & Tw          | Hall and Twells Reports Chancery, 2 vols 1848—1850                              |
| H & W           | Hurlstone and Walmsley's Reports Exchequer 1 vol 1840—1841                      |
| H I Cas         | Clark's Reports House of Lords 11 vols 1817—1866                                |
| Hag Adm         | Haggard's Reports, Admiralty 3 vols, 1822—1838                                  |
| Hag Con         | Haggard's Consistorial Reports 2 vols 1839—1841                                 |
| Hag Ecc         | Haggard's Ecclesiastical Reports 4 vols 1827—1833                               |
| Hailes          | Hailes's Decisions (Court of Session (Scotland) 2 vols 1866—1891                |
| Hale C I        | Hale's Common Law   |
| Hale P O        | Hale's Pleas of the Crown 2 vols  |
| Har & Ruth      | Harrison and Rutherford's Reports Common Pleas 1 vol 1865—1866                  |
| Har & W         | Harrison and Wollaston's Reports Kings Bench and Bail Court 2 vols 1830—1836    |
| Harc            | Harcarse's Decisions Court of Session (Scotland) fol 1 vol 1681—1691            |
| Hard            | Hardres' Reports Exchequer fol 1 vol 1655—1669                                  |
| Hare            | Hare's Reports Chancery 11 vols 1841—1853                                       |
| Hawk P O        | Hawkins's Pleas of the Crown 2 vols   |
| Hayes           | Hayes's Reports Exchequer (Ireland) 1 vol 1830—1832                             |
| Hayes & Jo      | Hayes and Jones's Reports Exchequer (Ireland) 1 vol 1832—1834                   |
| Hem & M         | Hemming and Miller's Reports Chancery 2 vols 1862—1866                          |
| Het .           | Hetley's Reports Common Pleas fol 1 vol 1627—1631                               |
| Hob             | Hobart's Reports Common Pleas fol 1 vol 1613—1620                               |
| Hodg            | Hodges Reports Common Pleas 3 vols 1830—1837                                    |
| Hog             | Hogan's Reports Rolls Court (Ireland) 2 vols 1816—1834                          |
| Holt (ADM)      | W Holt's Rule of the Road Cases Admiralty 1 vol 1863—1867                       |
| Holt (EQ)       | W Holt's Equity Reports 1 vol 1846  |
| Holt (K B)      | Sir John Holt's Reports Kings Bench fol 1 vol 1668—1710                         |
| Holt (N P)      | H Holt's Reports, Nisi Prius 1 vol 1810—1817                                    |
| Home Ct of Sess | Home's Decisions, Court of Session (Scotland) fol 1 vol 1730—1744               |
| Hop & Colt      | Hopwood and Coltman's Registration Cases 2 vols 1868—1878                       |
| Hop & Ph        | Hopwood and Philbrick's Registration Cases 1 vol 1863—1867                      |
| Horn & H        | Horn and Hurlstone's Reports Exchequer 2 vols 1838—1839                         |
| Hov Suppl       | Hovenden's Supplement to Vesey Jun's Reports, Chancery 2 vols 1753—1817         |
| Hud & B         | Hudson and Brookes Reports Kings Bench and Exchequer (Ireland) 2 vols 1827—1831 |
| Hume            | Hume's Decisions Court of Session (Scotland) 1 vol 1811—1822                    |
| Hut             | Hutton's Reports Common Pleas fol 1 vol 1617—1638                               |
| Hy Bl           | Henry Blackstone's Reports Common Pleas 2 vols, 1768—1796                       |
| I O L R         | Irish Common Law Reports, 17 vols 1849—1866                                     |
| I Ch. R.        | Irish Chancery Reports, 17 vols 1850—1867                                       |
| I Eq. R.        | Irish Equity Reports 13 vols 1838—1851  |
| I L. R.         | Irish Law Reports 13 vols, 1838—1851  |

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| I L T                  | Irish Law Times 1867—(current)   |
| I R (preceded by date) | Irish Reports since 1893 ( <i>e g</i> [1894] 1 I R)                            |
| I R C L                | Irish Reports Common Law 11 vols 1866—1877                                     |
| I R Eq                 | Irish Reports Equity 11 vols 1866—1877   |
| Ir Circ Cas            | Irish Circuit Cases 1 vol, 1841—1843   |
| Ir Jur                 | Irish Jurist 18 vols 1849—1866   |
| Ir L Rec 1st ser       | Law Recorder (Ireland) 1st series 4 vols 1827—1831                             |
| Ir L Rec (N s)         | Law Recorder (Ireland) New Series 6 vols, 1833—1838                            |
| Irv                    | Irvine's Justiciary Reports (Scotland) 5 vols 1852—1867                        |
| J Bridg                | Sir John Bridgman's Reports Common Pleas fol 1 vol 1613—1621                   |
| J P                    | Justice of the Peace 1837—(current)  |
| J Shaw Just            | J Shaw's Justiciary Reports (Scotland) 1 vol 1848—1852                         |
| Jac                    | Jacob's Reports Chancery 1 vol, 1821—1823                                      |
| Jac & W                | Jacob and Walker's Reports Chancery 2 vols 1819—1821                           |
| Jebb C C               | Jebb's Crown Cases Reserved (Ireland) 1 vol 1822—1840                          |
| Jebb & B               | Jebb and Bourke's Reports Queen's Bench (Ireland) 1 vol, 1841—1842             |
| Jebb & S               | Jebb and Symes Reports, Queen's Bench (Ireland) 2 vols 1838—1841               |
| Jenk                   | Jenkins Reports 1 vol 1220—1623  |
| Jo & Car               | Jones and Carey's Reports Exchequer (Ireland) 1 vol 1838—1839                  |
| Jo & Lat               | Jones and La Touche's Reports Chancery (Ireland) 3 vols 1844—1846              |
| Jo Ex Ir               | T Jones Reports Exchequer (Ireland) 2 vols 1834—1838                           |
| John                   | Johnson's Reports Chancery 1 vol 1858—1860                                     |
| John & H               | Johnson and Hemmings Reports Chancery 2 vols 1860—1862                         |
| Jur                    | Jurist Reports 18 vols, 1837—1854  |
| Jur (N s)              | Jurist Reports New Series 12 vols 1855—1867                                    |
| Just Inst              | Justinian's Institutes   |
| K & G                  | Keane and Grant's Registration Cases, 1 vol 1854—1862                          |
| K & J                  | Kay and Johnson's Reports Chancery 4 vols 1803—1808                            |
| K B (preceded by date) | Law Reports King's Bench Division since 1900 ( <i>e g</i> [1901] 2 K B)        |
| Kames Dict Dec         | Kames Dictionary of Decisions Court of Session (Scotland) fol 2 vols 1640—1741 |
| Kames Rem Dec          | Kames Remarkable Decisions Court of Session (Scotland) 2 vols 1716—1702        |
| Kames Sel Dec          | Kames Select Decisions Court of Session (Scotland) 1 vol 1752—1768             |
| Kay                    | Kay's Reports Chancery 1 vol, 1853—1854  |
| Keb                    | Keble's Reports fol 3 vols 1661—1677   |
| Keen                   | Keen's Reports Rolls Court 2 vols 1836—1838                                    |
| Keil                   | Keilwey's Reports, King's Bench fol, 1 vol 1327—1578                           |
| Kel                    | Sir John Kelyng's Reports Crown Cases, fol, 1 vol, 1662—1707                   |
| Kel. W                 | W Kelyng's Reports, fol 1 vol, Chancery, 1730—1732 King's Bench fol 1731—1734  |
| Keny                   | Kenyon's Notes of Cases King's Bench, 2 vols, 1753—1769                        |

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| Keny (OH)              | Chancery Cases in Vol II. of Kenyon's Notes of Cases, 1753—1754                          |
| Kilkerran              | Kilkerran's Decisions, Court of Session (Scotland) fol 1 vol. 1738—1752                  |
| Knapp                  | Knapp's Reports Privy Council 3 vols, 1829—1836  |
| Kn & Omb               | Knapp and Ombler's Election Cases 1 vol, 1834—1835                                       |
| L. A                   | Lord Advocate  |
| L & G temp Plunk       | Lloyd and Goold's Reports temp Plunkett Chancery (Ireland) 1 vol 1834—1839               |
| L & G temp Sugd        | Lloyd and Goold's Reports temp Sugden Chancery (Ireland) 1 vol 1835                      |
| L & Welsb              | Lloyd and Welsby's Commercial and Mercantile Cases 1 vol 1829—1830                       |
| L G R                  | Local Government Reports 1902—(current)  |
| L J                    | Law Journal 1866—(current)   |
| L J (ADM)              | Law Journal Admiralty 1866—1875  |
| L J (BCY)              | Law Journal Bankruptcy 1832—1880   |
| L J (OH)               | Law Journal Chancery 1822—(current)  |
| L J (C P)              | Law Journal Common Pleas 1822—1875   |
| L J (ECCL)             | Law Journal Ecclesiastical Cases 1866—1875   |
| L J (EX)               | Law Journal Exchequer 1830—1875  |
| L J (EX EQ)            | Law Journal Exchequer in Equity 1835—1841  |
| L J (K B or Q B)       | Law Journal King's Bench or Queen's Bench 1822—(current)                                 |
| L J (M C)              | Law Journal Magistrates Cases 1826—1896  |
| L J N O                | Law Journal Notes of Cases 1866—1892 (from 1893 see Law Journal)                         |
| L J (O S)              | Law Journal Old Series 10 vols 1823—1831   |
| L J (P)                | Law Journal Probate Divorce and Admiralty 1875—(current)                                 |
| L J (P & M)            | Law Journal Probate and Matrimonial Cases 1808—1859 1866—1875                            |
| L J (P C)              | Law Journal Privy Council 1865—(current)   |
| L J (P M & A)          | Law Journal Probate Matrimonial and Admiralty 1860—1865                                  |
| L M & P                | Lowndes Maxwell and Pollock's Reports Bail Court and Practice 2 vols 1850—1851           |
| L R                    | Law Reports  |
| L R A & E              | Law Reports Admiralty and Ecclesiastical Cases 4 vols, 1865—1875                         |
| L R C C R              | Law Reports Crown Cases Reserved 2 vols. 1865—1875                                       |
| L R C P                | Law Reports Common Pleas 10 vols 1865—1875   |
| L R Eq                 | Law Reports Equity Cases 20 vols 1865—1875   |
| L R Exch               | Law Reports Exchequer 10 vols 1865—1875  |
| L R H L                | Law Reports English and Irish Appeals and Peerage Claims House of Lords 7 vols 1866—1875 |
| L R Ind App            | Law Reports Indian Appeals Privy Council 1873—(current)                                  |
| L R. Ind. App Supp Vol | Law Reports Indian Appeals Privy Council Supplementary Volume 1872—1873                  |
| L R Ir                 | Law Reports (Ireland) Chancery and Common Law 32 vols 1877—1893                          |
| L R. P C               | Law Reports Privy Council, 6 vols 1865—1875  |
| L R P & D              | Law Reports Probate and Divorce 3 vols 1865—1875   |
| L R Q B                | Law Reports Queen's Bench 10 vols 1865—1875  |
| L R. Sc & Div          | Law Reports Scotch and Divorce Appeals House of Lords 2 vols 1866—1875                   |
| L T                    | Law Times Reports 1859—(current)   |
| L T Jo                 | Law Times Newspaper, 1843—(current)  |
| L T (O S)              | Law Times Reports Old Series, 34 vols 1843—1860  |

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| Lane               | Lane's Reports Exchequer fol 1 vol, 1605—1611                                   |
| Lat                | Latch's Reports King's Bench fol 1 vol 1625—1628                                |
| Laws. Reg Cas      | Lawson's Registration Cases 1885—(current)                                      |
| Ld Raym            | Lord Raymond's Reports, King's Bench and Common Pleas 3 vols, 1694—1732         |
| Leach              | Leach's Crown Cases 2 vols 1730—1814  |
| Lee                | Sir G Lee's Ecclesiastical Judgments, 2 vols, 1752—1758                         |
| Lee temp Hard      | T Lee's Cases temp Hardwicke King's Bench 1 vol. 1733—1738                      |
| Le & Ca            | Leigh and Cave's Crown Cases Reserved 1 vol, 1861—1865                          |
| Leon               | Leonard's Reports King's Bench Common Pleas and Exchequer fol 4 parts 1552—1615 |
| Lev                | Levinz's Reports King's Bench and Common Pleas fol 3 vols 1680—1696             |
| Lew O O            | Lewin's Crown Cases on the Northern Circuit 2 vols 1822—1838                    |
| Ley                | Ley's Reports King's Bench fol 1 vol 1608—1629                                  |
| Lib Ass.           | Liber Assisarum Year Books 1—51 Edw III   |
| Lilly              | Lilly's Reports and Pleadings of Cases in Assize fol 1 vol                      |
| Litt               | Littleten's Reports Common Pleas fol 1 vol 1627—1631                            |
| Lofft              | Lofft's Reports King's Bench, fol 1 vol. 1772—1774                              |
| Long & T           | Longfield and Townsends Reports Exchequer (Ireland) 1 vol 1841—1842             |
| Lud E O            | Luders' Election Cases 3 vols 1784—1787   |
| Lumley P L O       | Lumley's Poor Law Cases 2 vols 1834—1842  |
| Lush               | Lushington's Reports Admiralty 1 vol 1859—1862                                  |
| Lut                | Sir E Lutwyche's Entries and Reports Common Pleas 2 vols 1682—1704              |
| Lut Reg Cas        | A J Lutwyche's Registration Cases, 2 vols 1843—1853                             |
| Lynd               | Lyndwood Provinciale fol 1 vol  |
| M & S              | Maule and Selwyn's Reports King's Bench 6 vols 1813—1817                        |
| M & W              | Meeson and Welsby's Reports Exchequer 16 vols 1836—1847                         |
| Mac & G            | Macnaghten and Gordon's Reports Chancery, 3 vols, 1849—1852                     |
| Mac & H            | Maciae and Hertslet's Insolvency Cases 1 vol 1847—1852                          |
| M Cle              | M Cleland's Reports Exchequer 1 vol 1824  |
| M Cle & Yo         | M Cleland and Younge's Reports Exchequer 1 vol. 1824—1825                       |
| Macfarlane         | Macfarlane's Jury Trials Court of Session (Scotland) 3 parts 1838—1839          |
| MacI & Rob         | Maclean and Robinson's Scotch Appeals (House of Lords) 1 vol 1839               |
| Macph (Ct of Sess) | Macpherson Court of Session (Scotland) 3rd series 11 vols 1862—1873             |
| Macq               | Macqueen's Scotch Appeals House of Lords 4 vols, 1849—1865                      |
| Macr               | Macrory's Patent Cases 2 parts 1847—1856  |
| Madd               | Maddock's Reports, Chancery 6 vols, 1810—1821                                   |
| Madd & G           | Maddock and Geldart's Reports Chancery, 1 vol 1819—1822 (Vol VI of Madd.)       |
| Madox              | Madox's Formulæ Anglicanum  |
| Madox Exch.        | Madox's History and Antiquities of the Exchequer 2 vols                         |
| Man & G            | Manning and Granger's Reports, Common Pleas 7 vols 1840—1845                    |



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| Man & Ry (κ B.) | Manning and Rylands Reports Kings Bench, 5 vols 1827—1830   |
| Man & Ry (M O)  | Manning and Rylands Magistrates Cases, 3 vols, 1827—1830  |
| Mans            | Manson's Bankruptcy and Company Cases 1893—(current)  |
| Mar L O         | Maritime Law Reports (Crockford) 3 vols 1860—1871   |
| March           | March's Reports, Kings Bench and Common Pleas 1 vol 1639—1642                                       |
| Marr            | Marriott's Decisions Admiralty 1 vol 1776—1779  |
| Marsh.          | Marshall's Reports Common Pleas 2 vols, 1813—1816   |
| Mayn            | Maynard's Reports Exchequer Memoranda of Edw I and Year Books of Edw II Year Books Part I 1273—1326 |
| Meg             | Megone's Companies Acts Cases, 2 vols 1889—1891   |
| Mer             | Merivale's Reports Chancery 3 vols 1815—1817  |
| Milw            | Milward's Ecclesiastical Reports (Ireland) 1 vol 1819—1843  |
| Mod Rep         | Modern Reports 12 vols, 1669—1755   |
| Mol             | Molloy's Reports Chancery (Ireland) 3 vols, 1808—1831   |
| Mont            | Montagu's Reports Bankruptcy 1 vol 1829—1832  |
| Mont & A        | Montagu and Ayrton's Reports Bankruptcy 3 vols 1832—1838  |
| Mont & B        | Montagu and Bligh's Reports Bankruptcy 1 vol 1832—1833  |
| Mont & Ch       | Montagu and Chitty's Reports Bankruptcy, 1 vol, 1838—1840   |
| Mont D & De G   | Montagu Deacon and De Gex's Reports Bankruptcy 3 vols 1840—1844                                     |
| Mont & M        | Montagu and Macarthur's Reports Bankruptcy 1 vol 1826—1830  |
| Moo P O O       | Moore's Privy Council Cases, 10 vols, 1836—1863   |
| Moo P O C (N S) | Moore's Privy Council Cases New Series 9 vols 1862—1873   |
| Moo Ind App     | Moore's Indian Appeal Cases, Privy Council 14 vols 1836—1872  |
| Moo & P         | Moore and Payne's Reports Common Pleas 5 vols, 1827—1831  |
| Moo & S         | Moore and Scott's Reports, Common Pleas 4 vols 1831—1834  |
| Mood & M        | Moody and Malkin's Reports, Nisi Prius 1 vol, 1826—1830   |
| Mood & B        | Moody and Robinson's Reports Nisi Prius 2 vols, 1830—1844   |
| Mood. C C       | Moody's Crown Cases Reserved 2 vols, 1824—1844  |
| Moore (κ B)     | Sir F Moore's Reports Kings Bench fol 1 vol 1485—1620   |
| Moore (C P)     | J B Moore's Reports Common Pleas 12 vols 1817—1827  |
| Mor Dict        | Mouison's Dictionary of Decisions Court of Session (Scotland) 43 vols 1532—1808                     |
| Morr            | Morrell's Reports Bankruptcy 10 vols 1884—1893  |
| Mos             | Moseley's Reports Chancery fol, 1 vol 1726—1730   |
| Murp & H        | Murphy and Hurlstone's Reports Exchequer 1 vol, 1837  |
| Murr            | Murray's Reports Jury Court (Scotland) 5 vols 1816—1830   |
| My & Or         | Myline and Craig's Reports, Chancery 5 vols 1835—1841   |
| My. & K.        | Myline and Keen's Reports, Chancery 3 vols 1832—1835  |

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| Nels                 | Nelson's Reports Chancery 1 vol 1625—1692                                     |
| Nev & M (κ β)        | Nevile and Manning's Reports King's Bench 6 vols 1832—1836                    |
| Nev & M (μ α)        | Nevile and Manning's Magistrates Cases 3 vols, 1832—1836                      |
| Nev & P (κ β)        | Nevile and Perry's Reports King's Bench 3 vols 1836—1838                      |
| Nev & P (μ α)        | Nevile and Perry's Magistrates Cases 1 vol 1836—1837                          |
| New Mag Cas.         | New Magistrates Cases (Bittleston Wise and Parnell) 2 vols 1844—1848          |
| New Pract Cas        | New Practice Cases (Bittleston and Wise) 3 vols 1844—1848                     |
| New Rep              | New Reports 6 vols 1862—1865  |
| New Sess Cas         | New Sessions Magistrates' Cases (Carrow Hamerton Allen etc) 4 vols 1841—1861  |
| Nolan                | Nolan's Magistrates Cases 1 vol 1791—1793                                     |
| Notes of Cases       | Notes of Cases up the Ecclesiastical and Maritime Courts, 7 vols 1841—1850    |
| Noy                  | Noy's Reports King's Bench fol 1 vol, 1658—1649                               |
| O Bridg              | Sir Orlando Bridgman's Reports Common Pleas 1 vol 1660—1666                   |
| O M & H              | O Malley and Harcourt's Election Cases 1869—(current)                         |
| Owen                 | Owen's Reports King's Bench and Common Pleas fol 1 vol 1557—1614              |
| P (preceded by date) | Law Reports Probate Divorce and Admiralty Division since 1890 (e.g. [1891] P) |
| P D                  | Law Reports Probate Divorce and Admiralty Division 15 vols 1875—1890          |
| P Wms                | Peere Williams Reports Chancery and King's Bench 3 vols 1695—1735             |
| Palm                 | Palmer's Reports King's Bench fol 1 vol, 1619—1629                            |
| Park                 | Parke's Reports, Exchequer fol 1 vol 1743—1766                                |
| Pat App              | Paton's Scotch Appeals, House of Lords 6 vols 1726—1822                       |
| Pater App            | Paterson's Scotch Appeals House of Lords 2 vols 1801—1873                     |
| Peake                | Peake's Reports Nisi Prius 1 vol 1790—1794                                    |
| Peake Add Cas        | Peake's Additional Cases Nisi Prius 1 vol 1795—1812                           |
| Peck                 | Peckwell's Election Cases 2 vols 1803—1804                                    |
| Per & Dav            | Perry and Davison's Reports Queen's Bench 4 vols 1838—1841                    |
| Per & Kn             | Perry and Knapp's Election Cases 1 vol 1833                                   |
| Ph                   | Phillips Reports Chancery 2 vols 1841—1849                                    |
| Phil Ll Cas          | Phillips Election Cases 1 vol 1780  |
| Phillim              | J. Phillimore's Ecclesiastical Reports 3 vols 1754 <sup>2</sup> —1821         |
| Phillim Eccl Jud     | Sir R. Phillimore's Ecclesiastical Judgments 1 vol 1867—1875                  |
| Pig & R              | Piggott and Rodwell's Registration Cases 1 vol 1843—1845                      |
| Pite                 | Pitcairn's Criminal Trials (Scotland) 3 vols 1488—1624                        |
| Plowd                | Plowden's Reports fol 2 vols 1550—1579  |
| Poll                 | Pollexfen's Reports, King's Bench fol, 1 vol 1670—1682                        |
| Poph                 | Popham's Reports, King's Bench fol 1 vol 1591—1627                            |

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| <b>Fee, R. &amp; D.</b>         | <b>Power, Rolwell, and Dew's Election Cases</b> 2 vols, 1848—1856                         |
| <b>Pres. Ch.</b>                | <b>Precedents in Chancery</b> fol., 1 vol, 1689—1722                                      |
| <b>Price</b>                    | <b>Price's Reports Exchequer</b> , 13 vols 1814—1824                                      |
| <b>Q. B.</b>                    | <b>Queen's Bench Reports (Adolphus and Ellis New Series)</b> 18 vols 1841—1852            |
| <b>Q. B (preceded by date)</b>  | <b>Law Reports, Queen's Bench Division</b> , 1891—1901 ( <i>e.g.</i> [1891] 1 Q. B.)      |
| <b>Q. B. D.</b>                 | <b>Law Reports Queen's Bench Division</b> 20 vols 1875—1890                               |
| <b>R</b>                        | <b>The Reports</b> 15 vols 1893—1895  |
| <b>R (Ct. of Sess.)</b>         | <b>Bettie Court of Session Cases (Scotland)</b> 4th series 20 vols 1873—1898              |
| <b>R. P. O.</b>                 | <b>Reports of Patent Cases</b> 1884—(current)   |
| <b>R. E.</b>                    | <b>Revised Reports</b>  |
| <b>R. S. O.</b>                 | <b>Rules of the Supreme Court</b>   |
| <b>Rast</b>                     | <b>Rastell's Entries</b>  |
| <b>Rayn</b>                     | <b>Rayner's Tithe Cases</b> 3 vols 1575—1782  |
| <b>Real Prop. Cas.</b>          | <b>Real Property Cases</b> 2 vols 1843—1847   |
| <b>Rep. Ch.</b>                 | <b>Reports in Chancery</b> fol. 3 vols 1615—1710  |
| <b>Rick &amp; M.</b>            | <b>Rickards and Michael's Locus Standi Reports</b> 1 vol. 1885—1889                       |
| <b>Rick &amp; S.</b>            | <b>Rickards and Saunders Locus Standi Reports</b> 1 vol 1890—1894                         |
| <b>Ridg. temp. H.</b>           | <b>Ridgeway's Reports temp. Hardwicke</b> 1 vol King's Bench 1733—1736 Chancery 1744—1746 |
| <b>Ridg. L. &amp; S.</b>        | <b>Ridgeway's App. and Schoales Reports (Ireland)</b> 1 vol 1793—1795                     |
| <b>Ridg. Parl. Rep.</b>         | <b>Ridgeway's Parliamentary Reports (Ireland)</b> 3 vols 1784—1796                        |
| <b>Rob. Decl.</b>               | <b>Robertson's Ecclesiastical Reports</b> 2 vols 1844—1853                                |
| <b>Rob. L. &amp; W.</b>         | <b>Roberts's Leeming and Wallis New County Court Cases</b> 1 vol 1849—1851                |
| <b>Robert App.</b>              | <b>Robertson's Scotch Appeals House of Lords</b> 1 vol 1709—1727                          |
| <b>Robin App.</b>               | <b>Robinson's Scotch Appeals House of Lords</b> 2 vols. 1840—1841                         |
| <b>Roll. Abr.</b>               | <b>Rolle's Abridgment of the Common Law</b> fol. 2 vols                                   |
| <b>Roll. Rep.</b>               | <b>Rolle's Reports King's Bench</b> , fol. 2 vols, 1614—1625                              |
| <b>Rom.</b>                     | <b>Romilly's Notes of Cases in Equity</b> 1 part 1772—1787                                |
| <b>Rose</b>                     | <b>Rose's Reports Bankruptcy</b> 2 vols 1810—1816   |
| <b>Ross L. O.</b>               | <b>Ross's Leading Cases in Commercial Law (England and Scotland)</b> 3 vols               |
| <b>Rowe</b>                     | <b>Rowe's Reports (England and Ireland)</b> 1 vol 1798—1823                               |
| <b>Rul. Cas.</b>                | <b>Campbell's Ruling Cases</b> 25 vols  |
| <b>Russ.</b>                    | <b>Rustell's Reports Chancery</b> 2 vols 1824—1829  |
| <b>Russ. &amp; M.</b>           | <b>Russell and Mylne's Reports Chancery</b> 2 vols 1829—1833                              |
| <b>Russ. &amp; Ry.</b>          | <b>Russell and Ryan's Crown Cases Reserved</b> 1 vol 1800—1823                            |
| <b>Ry. &amp; Can. Cas.</b>      | <b>Railway and Canal Cases</b> 7 vols 1835—1854   |
| <b>Ry. &amp; Can. Tr. Cas.</b>  | <b>Railway and Canal Traffic Cases</b> 1857—(current)                                     |
| <b>Ry. &amp; M.</b>             | <b>Ryan and Moody's Reports, Nisi Prius</b> 1 vol 1823—1826                               |
| <b>S. O.</b>                    | <b>Same Case</b>  |
| <b>S. O. (preceded by date)</b> | <b>Court of Session Cases (Scotland)</b> since 1906 ( <i>e.g.</i> [1906] S. O.)           |
| <b>S.-G.</b>                    | <b>Solicitor General</b>  |
| <b>Saint</b>                    | <b>Saint's Digest of Registration Cases</b> , 1843—1906 1 vol,                            |

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| Salk            | Salkeld's Reports King's Bench 3 vols., 1689—1712   |
| Sau & Sc        | Saunders and Scully's Reports, Rolls Court (Ireland) 1 vol., 1837—1840  |
| Saund.          | Saunders's Reports King's Bench, 2 vols., 1666—1672   |
| Saund. & A.     | Saunders and Austin's Locus Standi Reports 2 vols 1895—1904   |
| Saund & B       | Saunders and Bidder's Locus Standi Reports, 1906—(current)  |
| Saund & O       | Saunders and Cole's Reports Bail Court 2 vols 1846—1848   |
| Saund & M       | Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals Vols II and III) 2 vols 1802—1808 |
| Sav             | Savile's Reports Common Pleas fol 1 vol 1580—1591   |
| Say             | Sayer's Reports King's Bench fol 1 vol 1751—1706  |
| Sc Jur          | Scottish Jurist 46 vols 1829—1873   |
| Sc L R          | Scottish Law Reporter 1860—(current)  |
| Sch. & Lef      | Schoales and Lefroy's Reports Chancery (Ireland) 2 vols 1802—1806   |
| Sc R R          | Scots Revised Reports   |
| Scott           | Scott's Reports Common Pleas 8 vols 1834—1840   |
| Scott (N R)     | Scott's New Reports Common Pleas 8 vols 1840—1845   |
| Sea & Sm.       | Searle and Smith's Reports, Probate and Divorce 1 vol. 1859—1860  |
| Sel Cas Ch      | Select Cases in Chancery fol 1 vol 1685—1698 (Pt III of Cas in Ch)  |
| Sess Cas (K B)  | Sessions Settlement Cases King's Bench 2 vols 1710—1747   |
| Sh & MacL       | Shaw and Maclean's Scotch Appeals House of Lords 3 vols 1800—1838   |
| Sh (Ot of Sess) | Shaw Court of Session Cases (Scotland) 1st series 16 vols 1821—1838   |
| Sh Dig          | P Shaw's Digest of Decisions (Scotland) ed by Bell and Lamond 3 vols 1726—1868  |
| Sh Just         | P Shaw's Justiciary Decisions (Scotland) 1 vol. 1819—1831   |
| Sh Sc App       | P Shaw's Scotch Appeals, House of Lords 2 vols 1821—1824  |
| Sh Teind Ct     | P Shaw's Teind Court Decisions (Scotland) 1 vol 1821—1831   |
| Shep Touch      | Sheppard's Touchstone of Common Assurances  |
| Show            | Shower's Reports King's Bench 2 vols 1618—1695  |
| Show Parl Cas   | Shower's Cases in Parliament fol 1 vol 1694—1699  |
| Sid             | Siderfin's Reports King's Bench Common Pleas and Exchequer fol 2 vols 1657—1670   |
| Sim             | Simons Reports Chancery 17 vols 1826—1852   |
| Sim (N S)       | Simons Reports Chancery New Series 2 vols, 1850—1852  |
| Sim & St        | Simons and Stuart's Reports Chancery 2 vols 1822—1826   |
| Skin            | Skinner's Reports King's Bench fol 1 vol 1681—1691  |
| Sm & Bat.       | Smith and Batty's Reports King's Bench (Ireland) 1 vol 1824—1825  |
| Sm & G          | Smale and Giffard's Reports Chancery 3 vols. 1852—1858  |
| Smith K. B      | J P Smith's Reports, King's Bench, 3 vols., 1803—1806   |
| Smith L O       | Smith's Leading Cases 2 vols  |
| Smith Reg Cas   | O L Smith's Registration Cases, 1895—(current)  |

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|                     |   |
|---------------------|---|
| Smythe              | Smyth's Reports Common Pleas (Ireland) 1 vol 1839—1840                        |
| Sol Jo.             | Solicitors Journal 1856—(current)   |
| Spence              | Spence's Equitable Jurisdiction of the Court of Chancery                      |
| Spinks              | Spinks' Prize Court Cases 2 parts 1854—1856                                   |
| Stair Rep           | Stair's Decisions Court of Session (Scotland), fol. 2 vols, 1661—1661         |
| Stark               | Starkie's Reports Nisi Prius, 3 vols 1814—1823                                |
| Stat R & O Rev      | Statutory Rules and Orders Revised  |
| State Tr            | State Trials 34 vols 1163—1820  |
| State Tr (N s)      | State Trials New Series 8 vols 1820—1858                                      |
| Story *             | Story's Commentaries on Equity Jurisprudence                                  |
| stra                | Strange's Reports 2 vols 1716—1747  |
| Stu M & P           | Stuart, Milne and Peddie's Reports (Scotland) 2 vols 1801—1803                |
| Sty                 | Style's Reports King's Bench fol 1 vol 1646—1650                              |
| Sw                  | Swabey's Reports, Admiralty 1 vol 1855—1859                                   |
| Sw & Tr             | Swabey and Tristram's Reports Probate and Divorce 4 vols 1808—1865            |
| Swan                | Swanston's Reports Chancery 3 vols 1818—1821                                  |
| Swin                | Swinton's Justiciary Reports (Scotland) 2 vols 1836—1841                      |
| Syme                | Syme's Justiciary Reports (Scotland) 1 vol 1826—1829                          |
| T & M               | Temple and Mew's Criminal Appeal Cases 1 vol 1848—1851                        |
| T Jo                | Sir T Jones's Reports King's Bench and Common Pleas fol 1 vol 1669—1684       |
| T L R               | The Times Law Reports 1854—(current)  |
| T Raym              | Sir T Raymond's Reports King's Bench fol 1 vol 1660—1683                      |
| Taml                | Tamlyn's Reports Rolls Court 1 vol 1829—1830                                  |
| Taunt               | Taunton's Reports Common Pleas 8 vols 1807—1819                               |
| Tax Cas             | Tax Cases 1850—(current)  |
| Term Rep            | Term Reports (Durnford and East) fol 8 vols 1785—1800                         |
| Toth                | Tothill's Transactions in Chancery 1 vol 1559—1646                            |
| Trist               | Tristram's Consistory Judgments 1 vol 1873—1892                               |
| Tudor L O Merc Law  | Tudor's Leading Cases on Mercantile and Maritime Law                          |
| Tudor I C Real Prop | Tudor's Leading Cases on Real Property  |
| Turn & R.           | Turner and Russell's Reports Chancery 1 vol 1822—1825                         |
| Tyr                 | Tytwitt's Reports Exchequer 5 vols 1830—1835                                  |
| Tyr & Gr            | Tytwitt and Granger's Reports Exchequer 1 vol 1830—1836                       |
| Vaugh               | Vaughan's Reports Common Pleas fol 1 vol 1666—1673                            |
| Vent.               | Ventris Reports (Vol I King's Bench Vol II Common Pleas) fol 2 vols 1668—1691 |
| Vern.               | Vernon's Reports Chancery 2 vols 1680—1719                                    |
| Vern & Scr          | Vernon and Scriven's Reports King's Bench (Ireland) 1 vol, 1786—1788          |
| Ves.                | Vesey Jun's Reports Chancery 19 vols 1789—1817                                |
| Ves & B.            | Vesey and Beames's Reports Chancery 3 vols 1812—1814                          |
| Ves Sen             | Vesey Sen's Reports 2 vols 1747—1756  |
| Vin. Abr            | Viner's Abridgment of Law and Equity, fol. 22 vols                            |
| Vin. Supp           | Supplement to Viner's Abridgment of Law and Equity 6 vols,                    |

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|                        |   |
|------------------------|---|
| W Jo                   | Sir W Jones's Reports King's Bench and Common Pleas, fol 1 vol 1620—1640            |
| W N (preceded by date) | Law Reports Weekly Notes 1866—(current (e.g. [1866] W N)                            |
| W R                    | Weekly Reporter 54 vols 1852—1906   |
| Wallis                 | Wallis's Reports Chancery (Ireland) 1 vol 1766—1791                                 |
| Web Pat Cas            | Webster's Patent Cases 2 vols 1602—1855   |
| Welsh Reg Cas          | Welsh's Registry Cases (Ireland) 1 vol 1832—1840                                    |
| Went Off Ex            | Wentworth's Office and Duty of Executors  |
| West                   | West's Reports House of Lords 1 vol 1839—1841                                       |
| West temp Hard         | West's Reports temp Hardwicke Chancery 1 vol 1736—1740                              |
| West Tithe Cas         | Western's London Tithe Cases 1 vol 1692—1722  |
| White                  | White's Justiciary Reports (Scotland) 3 vols 1866—1893                              |
| White & Tud I O        | White and Tudor's Leading Cases in Equity 2 vols                                    |
| Wight                  | Wightwick's Reports Exchequer 1 vol 1810—1811                                       |
| Will Woll & Dav        | Willmore Wollaston and Davison's Reports Queen's Bench and Bail Court 1 vol 1837    |
| Will Woll & H          | Willmore Wollaston and Hodges Reports Queen's Bench and Bail Court 2 vols 1838—1839 |
| Willes                 | Willes Reports Common Pleas 1 vol 1731—1758   |
| Wilm                   | Wilmot's Notes of Opinions and Judgments 1 vol 1757—1770                            |
| Wils                   | G Wilson's Reports King's Bench and Common Pleas fol 3 vols 1742—1774               |
| Wils & S               | Wilson and Shaw's Scotch Appeals House of Lords 7 vols 1825—1835                    |
| Wils (CH)              | J Wilson's Reports Chancery 2 vols 1818—1819  |
| Wils (EX)              | J Wilson's Reports Exchequer in Equity 1 part 1817                                  |
| Win                    | Winch's Reports Common Pleas fol 1 vol 1621—1625                                    |
| Wm Bl                  | William Blackstone's Reports King's Bench and Common Pleas fol 2 vols 1746—1779     |
| Wm Rob                 | William Robinson's Reports Admiralty 3 vols 1838—1850                               |
| Wms Saund              | Williams Notes to Saunders Reports 2 vols   |
| Wolf & B               | Wolferstan and Bristow's Election Cases 1 vol 1859—1864                             |
| Wolf & D               | Wolferstan and Dew's Election Cases 1 vol 1851—1858                                 |
| Woll                   | Wollaston's Reports Bail Court and Practice 1 vol 1840—1841                         |
| Wood                   | Wood's Tithe Cases, Exchequer 4 vols 1650—1798                                      |
| Y & O Ch Cas           | Younge and Collyer's Reports Chancery Cases 2 vols 1841—1843                        |
| Y & O (EX)             | Younge and Collyer's Reports Exchequer in Equity 4 vols 1834—1842                   |
| Y & J                  | Younge and Jervis Reports Exchequer 3 vols 1826—1830                                |
| Y B                    | Year Books  |
| Yelv                   | Yelverton's Reports King's Bench fol 1 vol 1602—1613                                |
| You.                   | Younge's Reports Exchequer in Equity, 1 vol, 1830—1832                              |



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# LIEN

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## Part I—Definition and Nature

Lien

Primary  
sense

Possession  
as a rule  
essential

1 Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied (a) In this primary sense it is given by law and not by contract for contract supersedes lien and limits the rights of the person claiming under contract to those contracted for (b) Such a lien does not as a rule arise until possession of the property is obtained (c) but in exceptional cases possession is not essential to constitute a common law lien as for instance in the cases of liens for seamen's wages and bottomry bonds (d)

(a) *Hammonds v Barclay* (1902) 2 L J 227 23; *Re Holmes Ex parte Heywood* (1815) 2 Rose 355; *Illbarrow v Mason* (1793) 6 Fost 20 n 27 H J As regards common law liens this title deals only with the general principles applicable to such liens for the law relating to the liens which arise in particular trades and professions reference should be made to the titles (see the cross references *supra*) dealing with such trades and professions

(b) *Waller v Birch* (1750) 6 Term Rep 258 *Re Leith's Estate Chambers v Davidson* (1866) 1 R 1 P C 296 305 *Lisher v Smith* (1819) 4 App Cas 1 Lien is sometimes spoken of as arising by contract but such a lien is in the nature of a pledge (*Gladstone v Bulley* (1817) 2 Mer 401 404 see p 9 *post* and title PAWNS AND PLEDGES) As to how far a written agreement to give a lien is a bill of sale see *Great Eastern Railway v Lord's Trustees* [1909] A C 109 and see title BILLS OF SALE Vol III p 7 As regards possessory liens the rules in courts of law and courts of equity under the old practice were the same (*Cadstone v Birley supra* *Orenham v Esdaile* (1828) 2 Y & J 493 see *Heywood v Waring* (1815) 4 Camp 291)

(c) *Kinloch v Gray* (1889) 3 Term Rep 119 and see *Shaw v Neale* (1858) 6 H J Cas 581 601

(d) Cross Law of Lien 4 Equitable liens in which is included the lien of consignees in England for supplies furnished for West Indian estates (see p 22, *post*) arise independently of possession (see p 14 *post*) As to maritime liens see p 28 *post* and title ADMIRALTY Vol I, pp 61, 67 69, 72 *et seq*, and see title SHIPPING AND NAVIGATION

## PART I—DEFINITION AND NATURE

Possessory liens are divided into general liens (e) and particular liens (f)

**PART I**  
**Definition**  
**and Nature**  

---

**Classification**  
**Nature of**  
**lien**

2 A lien is a right of defence, not a right of action, and consequently can be claimed in respect of a statute barred debt (g) But a lien does not, except in special circumstances give any right to sell the thing retained (h), nor can the lien itself be assigned (i) Accordingly a lien being merely a personal right which continues during possession of the goods, cannot be taken in execution (k) In the case of a perishable article such as a horse the party claiming the lien is bound to take reasonable care of such article (l), but, generally a person having a lien on a chattel who keeps it for the purpose of enforcing his lien cannot make any claim against the owner for so keeping (m)

3 The possession must be rightful (n) it must not be for a particular purpose (o) and it must be continuous (p)

**Essential**  
**incidents**

The debt in respect of which a lien is claimed must be due not accruing (q) Therefore a contract for a particular mode of future payment which precludes any implied contract for immediate payment does not give rise to a lien even in the case of labour

(e) See p 7 *post*

(f) See p 10 *post*

(g) See title IMITATION OF ACTIONS p 41 *post* and see *Higgins v Scott* (1831) 2 B & Ad 413 in which case possession was not necessary a sheriff had levied execution for costs under a judgment and realised a sum of cash the lien was claimed by the attorney in respect of his costs against his own client the party at whose instance execution had been levied and was allowed though the attorney could not have sued the client because his claim would have been statute barred

(h) See p 20 *post*

(i) *Wilkins v Carmichael* (1779) 1 Doug (K B) 101 But a purchaser of an article which is subject to a lien having called upon his vendor to pay off the sum claimed can himself pay off that sum in order to obtain possession of what he has purchased and sue the vendor for any sum properly so paid (*Leach v Waters* (1828) 3 C & P 520) As to delivery of goods by a person who has a lien thereon to another person so as to preserve his lien see *M Combe v Davies* (1800) 7 East 5 The statutory right to pledge conferred on factors (see title AGENCY Vol I pp 200 *et seq*) arises entirely by statute and is an exception to the general rule (*Cole v North Western Bank* (1845) L R 10 C P 304 Ex Ch)

(k) *Legg v Evans* (1840) 6 M & W 36 As to what can be seized in execution see title EXECUTION Vol XIV pp 44 *et seq*

(l) *Scarfe v Morgan* (1838) 4 M & W 270 It must be kept in a reasonable place and with reasonable care (*Great Western Rail Co v Crouch* (1858) 3 H & N 183 Ex Ch) Possibly a railway company having a horse in its possession for the care of which it has to incur charges may have a lien for such charges (*Great Northern Rail Co v Swaffield* (1844) L R 9 Exch 132) As to a railway company's lien for food supplied to animals see title CARRIERS Vol IV p 40

(m) *Somes v British Empire Shipping Co* (1860) 8 H L Cas 338 As to enforcement of lien see p 25 *post*

(n) See p 4 *post*

(o) See p 5 *post*

(p) *Forth v Simpson* (1849) 13 Q B 680 *Kruger v Wilcox* (1755), Amb. 252 *Sweet v Pym* (1800) 1 East 4 see p 6 *post*

(q) *Crawshaw v Homrigh* (1820) 4 B & Ald 50 *Wegner v Dene Steam Shipping Co*, [1900] 2 K B 94, 101,

**PART I**  
**Definition**  
**and Nature.**

**Effect of void**  
**agreement.**

**Secondary**  
**sense.**  
**Non**  
**possessory**  
**lien.**

expended on a chattel (r) It is immaterial whether the contract for future payment is an express contract or is implied from usage of trade (s)

An agreement which is void from the beginning for want of legal formalities cannot give rise to a right of lien (t), but an agreement to do something which is illegal, as, for instance, to do certain work on Sunday can give rise to a lien if the work is done (a)

4 A lien in its secondary sense where the person claiming the lien has not got possession of the thing in respect of which the lien is claimed, is either judicial or equitable (b) Judicial liens are obligations established by judgments or orders of courts of justice binding the property but giving no right of possession (c) Equitable liens are founded upon the consideration of a duty or implied intention on the part of the owner to make property answerable for a specific claim (d)

## Part II—Possession Requisite for Existence

### SPOT 1—Wrongful Possession

**Possession**  
**wrongfully**  
**obtained**

5 No lien can be obtained by wrongful possession (e) thus a person who has obtained possession of the property of another by misrepresentation cannot set up a lien to which he might otherwise have been entitled (f) and a person paying freight duty or other charges in respect of goods of which he has obtained possession wrongfully cannot retain the goods pending repayment of such freight duty or charges (g) So a person cannot have a lien over property which he has acquired in an assumed character (h) Agents who have been employed by a person who subsequently

(r) *Chase v Westmore* (1816) 6 M & S 180 *Crawshay v Homfray* (1820) 4 B & Ald 50 and see titles BAILMENT Vol I p 561 WORK AND LABOUR and p 13 post

(s) *Rutt v Mitchell* (1815) 4 Camp 146 As to such a usage see title CUSTOM AND USAGES Vol X p 280 No lien is created on a fund the subject of litigation by an agreement to share the proceeds of such litigation (*Alexander v Hammond* (1854) 3 W R 145)

(t) *Fergusson v Norman* (1838) 5 Bing (N o) 76

(a) *Scarfe v Morgan* (1838) 4 M & W 270 282 and generally as to work done on Sundays see titles FACTORIES AND SHOPS Vol XIV pp 490 508 TIME

(b) Fisher Law of Mortgage 6th ed para 466 and see p 14 post

(c) Fisher Law of Mortgage 6th ed para 467 and see generally titles ESTOPPEL Vol XIII pp 323 et seq JUDGMENTS AND ORDERS Vol XVI pp 175 et seq

(d) Fisher Law of Mortgage 6th ed para 504 As to equitable lien see pp 14 et seq post

(e) *Gresham v Hyde* (1809) 2 Selwyn Law of Nisi Prius 1820 *Bernal v Pam* (1835) 1 Gale 17, 20

(f) *Maiden v Kempster* (1807) 1 Camp 12

(g) *Lempriere v Pasley* (1788) 2 Term Rep 485 *Stone v Lingwood* (1725) 1 Stra 651 The latter case was doubted by Lord MANSFIELD, C J, in *Green v Farmer* (1768) 4 Burr 2214 2218 but is believed to be good law

(h) *Wolens v Townshend* (1830) 1 Russ & M 361 per Lord LYNDHURST, L.C., at p 383

becomes bankrupt cannot by obtaining possession, after the bankruptcy, of goods which belonged to the bankrupt either through an act of the bankrupt (i) or of their own (j) retain the goods as against the bankrupt's trustee until moneys due to them from the bankrupt are paid

SECT 1  
Wrongful  
Possession.

It is immaterial, subject to certain exceptions (k), that the wrongful act is done by some third party, for at common law a person in possession of goods cannot, either by sale or pledge confer a better title than he himself has (l). But this rule does not apply where the article on which the lien is claimed is a negotiable instrument, in which case the person who has obtained possession without notice of any wrong doing can retain it (m) or where the party who wrongfully handed over the goods is acting under the Factors Act 1889 (n).

Wrongful act  
of third  
party

### SECT 2 — Possession obtained for a Particular Purpose

6 Although a person may by law be entitled to a general lien on property of another coming to his hands yet such general lien may be excluded if by the contract between the parties the property is placed in his hands only for a particular purpose (o). Such particular purpose may be shown by a document signed by the person receiving the property (p) or by letters written by the owner at the time of the deposit directing what is to be done with it (q) or by verbal conversation duly proved (r) or by correspondence between

Possession  
obtained for  
a particular  
purpose only

(i) *Nichols v Clent* (1811) 3 Price 541

(j) *Taylor v Robinson* (1818) 2 Moore (C P) 730 As to the effect of bankruptcy on lien see title BANKRUPTCY AND INSOLVENCY Vol II pp 117 224

(k) See the text *infra* and p 24 *post*

(l) *Buxton v Baughan* (1834) 6 C & P 674 *Cole v North Western Bank* (1845) L R 10 C P 354 362 but a wharfinger having in his possession goods bearing a fraudulent trade mark is not thereby deprived of his lien for his charges (*Moet v Tuckering* (1845) 8 Ch D 372 C A) As to the rights of the true owner of a chattel against an innocent holder see *Hartop v Hoare* (1743) 3 Atk 44

(m) *Brandao v Barnett* (1846) 12 Cl & Fin 787 805 H L Bills of Exchange Act 1882 (45 & 46 Vict c 61) s 27(3) see title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II p 498

(n) 52 & 53 Vict c 45 s 2 As to the power of a factor to pledge goods of his principal see titles AGENCY Vol I p 205 BANKRUPTCY AND INSOLVENCY Vol II p 169 As to the course of legislation by which the Factors Acts were passed see *Cole v North Western Bank supra* Although factors have a general lien for all moneys due to them (see p 7 *post*) the lien obtained on goods of which possession is obtained from them is in the absence of an agreement only a particular lien against the true owner (*Altentbach v Lewis* (1885) 10 App Cas 617)

(o) *Walker v Birch* (1795) 6 Term Rep 258 *Brandao v Barnett supra* and see title BANKERS AND BANKING Vol I, p 621

(p) *Walker v Birch supra* (receipt by cotton brokers for cotton, undertaking to account for proceeds of sale)

(q) *Buchanan v Findlay* (1829) 9 B & C 738 (bills remitted and directions given how the proceeds were to be applied) see also *Snath v Burrigide* (1812) 4 Taunt 684 (letter with bill of lading of ship's stores directing such stores to be handed over to Government)

(r) *Key v Flint* (1817) 8 Taunt 21 (bill deposited for purpose of raising money) *Burn v Brown* (1817) 2 Stark 272 (ship's certificate deposited by master of the ship with factors to enable them to pay duties), *Humphries*



**SECT 2**  
**Possession**  
**obtained for**  
**a Particular**  
**Purpose**

the parties (s) But the correspondence or evidence may only be sufficient to give the particular purpose priority over the general lien, which may be valid subject to such purpose (t) If it be the intention that deeds or papers deposited for a particular purpose are not to be subject to a general lien arising by custom, such deposit should be accompanied by a special agreement (u) Where the particular purpose is at an end and the documents are allowed to remain in the hands of a person *e.g.* a solicitor who is entitled by custom to a general lien, such general lien is good (v)

**SECT 3 — Possession must be Continuous**

**Continuity**  
**of possession**

7 It is essential to a possessory lien that the person claiming it should have the right of continued possession of the article in respect of which the lien is claimed, even where the care and skill exercised by such person would on general principles give rise to a right of lien (w) Thus a trainer of a racehorse who would on general principles have a lien because of his care and skill in improving the horse, has no lien if the owner can remove the horse to send him to run in races (x) and a livery stable keeper taking in a horse which is to be removed from time to time and ridden by the owner (y), and a person taking in cows on agistment, to feed on his grass which are to be removed to be milked by the owner have no lien (a)

▼ *Wilson* (1819) 2 Stark 566 (bill deposited for purpose of being discounted and after payment of particular debt balance to be paid to depositor) *Brandao* ▼ *Barnett* (1846) 12 Cl & Fin 78; H L (Exchequer bills handed to banker to be exchanged at maturity for new bills) Of course the facts of the case may be sufficient to show the purpose of the deposit for instance deeds relating to property proposed to be mortgaged which are delivered to a solicitor for the purpose of drawing the mortgage cannot be retained against the mortgagee until a debt due by the mortgagor is paid (*Lauson v Inghenson* (1824) 8 Mod Rep 306) As to a solicitor's lien see p 23 *post* and title SOLICITORS

(s) *Buch v Goirssen* (1860) 2 De G F & J 434 (bonds purchased by merchants in London on account of merchants in Hamburg, to be retained in London for safe custody)

(t) *Frith v Forbes* (1862) 4 De G F & J 409 C A

(u) *Ex parte Sterling* (1809) 16 Ves 258

(v) *Ex parte Sterling* *supra* *Ex parte Pemberton* (1810) 18 Ves 282

(w) *Forth v Simpson* (1849) 13 Q B 680 see *Great Eastern Railway v Lord's Trustee* [1909] A C 109

(x) *Forth v Simpson* *supra* It had been held in *Bevan v Waters* (1828) 3 C & P 220 and apparently in *Jacobs v Latour* (1828) 5 Bing 130 that a trainer had a lien but it is pointed out in *Jackson v Cummins* (1859) 5 M & W 342 that the judge had overlooked the usage that an owner may remove a racehorse to run races At the same time when a horse is delivered to a trainer to be trained for a particular race the trainer may set up a lien until he delivers the horse over to be run in that particular race (*Jackson v Cummins* *supra* *Forth v Simpson* *supra*)

(y) *Scarfe v Morgan* (1838) 4 M & W 270 283 A livery stable keeper is unable to claim a lien in the absence of agreement on two grounds (1) that his possession is not exclusive and (2) that he does nothing to improve the horse (*Wallace v Woodgate* (1824) Ry & M 193 *Judson v Fetheridge* (1833) 1 Cr & M 743), see also *Donatty v Crowther & Kelly* (1826) 11 Moore (C P) 479 *Orchard v Backett* (1854) 9 C B 698 compare *Re Sillence* *Ex parte Roy* (1877), 7 Ch D 70 As to an innkeeper's lien on the horse of his guest see title INNS AND INNKEEPERS Vol XVII p 320

(a) *Jackson v Cummins*, *supra*, *Chapman v Allen* (1832), Cro Car 271 In

Whether there is a right of continuous possession or not depends on the nature of the particular contract or the custom applicable to the subject matter (b)

SECT 3  
Possession  
must be  
Continuous

## Part III — General Lien

8 A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied (c). It can only exist (1) by virtue of the course of dealing between the parties in a particular case, (2) as a common law right arising from continuous and well recognised usage or (3) by express agreement (d).

General liens are discouraged (e) but where the usage has been frequently recognised the right of lien becomes part of the common law and is accepted by the courts without further evidence (f).

Such a general lien has been established (g) in the case of solicitors (h), bankers (i), factors (j), stockbrokers (k), warehouse keepers (l), and insurance brokers (m).

Nature.

Discouraged  
in law

Instances

*Richards v Symons* (1840) 8 Q. B. 90 a lien given to an agister by agreement was not lost by the removal of the agisted animal and see title ANIMALS Vol I p 387. For form of agreement for agistment of cattle, see Encyclopædia of Forms and Precedents Vol I p 425.

(b) *Forth v Simpson* (1849) 13 Q. B. 680 per PATERSON J at p 680.

(c) 2 Selwyn Law of Nisi Prius 1312. In *R v Humphery* (1825) M. C. & Y. 173 a wharfinger's general lien was held to prevail against an extent by the Crown.

(d) *Green v Farmer* (1769) 4 Burr 2214 2221. *Houghton v Matthews* (1803) 3 Bos. & P. 480 494. *Kirchner v Venus* (1859) 12 Moo P. C. C. 361. *Bock v Gorruisen* (1860) 2 De G. F. & J. 434 443.

(e) General liens are a great inconvenience to the bulk of the generality of traders because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body of creditors at large instead of coming in with them for an equal share of the insolvent estate. All these general liens infringe upon the system of the bankrupt laws the object of which is to distribute the debtor's estate proportionately among all the creditors and they ought not to be encouraged. (*Rushforth v Hadfield* (1806) 6 East 219 per LE BLANC J at p 528). Growing liens are an encroachment upon the Common Law (*Rushforth v Hadfield* (1806) 7 East 224 per Lord ELLENBOROUGH C.J. at p 229). As to effect of bankruptcy on a creditor's lien see title BANKRUPTCY AND INSOLVENCY Vol II pp 117 224 and p 10 *post*.

(f) *Brandao v Barnett* (1846) 12 Cl. & Fin. 787 800 H. L. and see title CUSTOM AND USAGES Vol A pp 212 23.

(g) 2 Selwyn Law of Nisi Prius 1314 referring to PARKE B. in *Turner v Deane* (1849) 3 Exch. 836 states that attorneys bankers and factors are the only persons having such a general lien but PARKE B. merely instances these persons as having a general lien.

(h) As to the lien of attorneys originally recognised by Lord MANSFIELD C.J. in *Wilkins v Carmichael* (1779) 1 Doug. (K.B.) 101 see *Cowell v Simpson* (1809) 16 Ves. 275 and title SOLICITORS.

(i) As to the lien of bankers see *Davis v Bowsher* (1794) 5 Term Rep. 488. *Brandao v Barnett* (1846) 12 Cl. & Fin. 787 H. L. and title BANKERS AND BANKING Vol I pp 620 *et seq.* As to a banker's right to set off a debit balance on a private account against a credit balance on an office account see *Teale v Brown & Co* (1894) 11 T. L. R. 56. The general lien of a

(j) (k) (l), (m) For notes (j), (k), (l), and (m) see next page

## PART III.

General  
Lien.General lien  
by course of  
dealing.

9 Where there is a general course of dealing between a merchant and a factor the latter may retain the goods of the former for the general balance due to him (n). In order to obtain a general lien as a factor an agent must be entrusted with possession of the goods for the purpose of a sale though a limit may be placed on the price and though the factor may not sell in his own name but an agent who has not possession of the goods is not entitled to a general lien as a factor (o). The lien extends to the price of the goods sold by the factor on behalf of the merchant (p) which price may be received after the bankruptcy of the merchant (q) and the lien is good, notwithstanding the bankruptcy of the factor with the result that a purchaser of goods from a factor indebted to him can set off the price against his own debt not only against the factor but also against the real vendor of the goods (r). As in all other cases of general lien, the lien is excluded where the goods are deposited for a specific purpose (a) or where the transaction in

banker does not extend to securities of the customer known by the banker to be affected by a trust (*Cuthbert v Roberts Lubbock & Co* [1909] 2 Ch 226 C A.)

(j) As to the lien of factors see also title AGENCY Vol I pp 197 et seq. But this lien is confined to factors strictly and does not extend to all cases of principal and agent (*Bock v Horriessen* (1860) 2 De G F & J 434 see also *Bowman v Malcolm* (1843) 11 M & W 833 *Harrison v Scott* (1846) 5 Moo P C C 357) In *Naylor v Mangles* (1794) 1 Tsp 109 and *Syars v Hartly* (1800) 3 Esp 81 wharfingers were stated to have a general lien and see *R v Humphery* (1825) M Cle & Yo 173 but this is not the case every where at all events not in Hull see title CUSTOM AND USAGES Vol X p 293 Packers being in the nature of factors have a general lien (*Green v Farmer* (1868) 4 Burr 2214 2222 *Re Butt Ex parte Shubrook* (1876) 2 Ch D 489 C A *Ex parte Deeze* (1748) 1 Atk 228) Calico printers appear to have a general lien for work done in their business but not for money lent or in respect of any other matter (*Weldon v Gould* (1801) 3 Esp 268) but this is an exceptional case of a tradesman having more than a particular lien for work done and see p 12 post.

(k) *Jones v Peppercorne* (1858) John 430 *Re London and Globe Finance Corporation* [1902] 2 Ch 416 *Hope (John D.) & Co v Glendinning* [1911] A C 419 See further title STOCK EXCHANGE.

(l) *Hill & Sons v London Central Markets Cold Storage Co Ltd* (1910) 102 L T 715 but see *Leuckhart v Cooper* (1836) 3 Bing (N C) 9. The conduct of the parties in any particular case may show that no general lien was intended (*Hill & Sons v London Central Markets Cold Storage Co Ltd supra*).

(m) *Hewison v Guthrie* (1836) 2 Bing (N C) 755 *Mann v Forrester* (1814) 4 Camp 60 and see *Hunter v Leathley* (1830) 10 B & C 858 *Fisher v Smith* (1878) 4 App Cas 1. As to an insurance broker's statutory lien on a policy of marine insurance see title INSURANCE Vol XVII pp 351 352.

(n) *Kruger v Wilcox* (1755) Amb 252. The balance may include any moneys which will become due on bills accepted by the factor on behalf of the merchant (*Re Fawcus Ex parte Buck* (1876) 3 Ch D 790). This rule applies only to goods dealt with in the ordinary course of business (*Compston v Haigh* (1838) 5 L J (C P) 99). For form of agreement for lien on goods between merchant or manufacturer and factor see *Encyclopaedia of Forms and Precedents*, Vol I, p 296.

(o) *Stevens v Buller* (1883) 25 Ch D 31 C A.

(p) *Kruger v Wilcox supra* *Drinkwater v Goodwin* (1775) 1 Cowp 251.

(q) *Robson v Kemp* (1803) 4 Esp 233. The lien exists until all debts of the bankrupt for which the factor is liable are paid (*Forcraft v Wood* (1828) 4 Binn 457).

(r) *Hudson v Granger* (1821) 5 B & Ald 27. As to the extension of the lien to a policy of marine insurance see title INSURANCE Vol XVII pp 351 352.

(s) *Walker v Bush* (1795), 6 Term Rep 258 see p 5 ante.

respect of which the claim arises was not one in which the factor was acting as such on behalf of the person against whom he claims the lien (b)

PART III  
General  
Lien

10 To establish a general lien in a particular case, for instance in a particular locality arising by usage the usage must be certain and reasonable and so universally acquiesced in that everyone in the trade knew of or on inquiry could have ascertained its existence (c) To establish a general lien of this nature there must be satisfactory evidence of ancient, numerous, and important instances of its exercise, if the evidence is sufficient to establish the usage, the parties are presumed to be aware of and are bound by the usage (d) The question whether the lien exists is one of fact (e)

General lien  
by usage

A particular lien arising by agreement on property deposited overrides the general lien of the deposittee on such property arising by virtue of usage (f)

11 Lien in its proper sense is a right which the law gives But it is usual to speak of lien by contract though such lien is more in the nature of an agreement for a pledge (g) If a mercantile relation which might involve a lien is created by a written contract and security is given for the result of the dealings in that relation the express stipulation and agreement of the parties for security excludes lien and limits their rights by the extent of the express contract made by them (h) Evidence of usage of a particular place to add to or affect the construction of a written contract may however be admitted on the principle that the parties who made the contract were both cognisant of the usage and are presumed to have made their agreement with reference to it but there can be no such presumption if either party is ignorant of the usage (i)

General lien  
by contract

An express agreement for a general lien may be made not only between individuals, but by articles of association of a limited

Lien arising  
from notice

(b) *Houghton v Matthews* (1803) 3 Bos & P 480 see *Compston v Haigh* (1836) 5 L J (C 1) 99

(c) *Faulc v Alcock* (1866) 4 L & F 1074 *Re Spotten & Co Ex parte Provincial Bank* (1871) 11 I R Lq 412 That the usage must be reasonable see also *Leuchhart v Cooper* (1836) 3 Bing (N C) 99 and title CUSTOM AND USAGES Vol X, p 269

(d) Cross Law of Lien 15 approved in *Re Spotten & Co Ex parte Provincial Bank supra*

(e) *Bleaden v Hancock* (1829) 1 C & P 152 and see title CUSTOM AND USAGES Vol X, p 254

(f) *Inman v Ware* (1855) John 769 see *Erith v Forbes* (1862) 4 De G F & J 409 C A As to particular liens see p 10 post

(g) *Gladstone v Birken* (1811) 2 Mer 401 See further title Pawns AND PLEDGES To constitute a lien by agreement there must be a specific appropriation of the property (*Jones v Starkey* (1852) 16 Jur 510)

(h) *Re Leith's Estate Chambers v Davidson* (1866) L R 1 P O 296, 305 Factors have a general lien by custom as a general rule but where they hold on an express agreement they only have the rights given by the agreement and general lien is excluded (*Walker v Birch* (1795) 6 Term Rep 258) Where there is an express antecedent contract a lien which might otherwise be implied does not arise (*Stevenson v Blakelock* (1818) 1 M. & S 535, 543).

(i) *Aichner v Venus* (1859), 12 Mo. P O C 361, 399 and see title CUSTOM AND USAGES, Vol X pp 260 261 264 et seq

### PART III General Lien.

company (j), or even by public notice given by bodies of traders that they will only do work on terms of having a general lien, but such notice must have come to the knowledge of the persons against whom the lien is claimed (k)

### Effect of liquidation and bankruptcy

12 The effect of an order to wind up a limited company which has entered into an agreement with some other person with whom it has dealings giving a general lien depends apparently upon the wording of the agreement but the principle appears to be that if after the order to wind up goods upon which the lien is claimed come into the possession of the person claiming the lien by the direction of the liquidator with knowledge on the part of the person claiming the lien of the liquidation and the title of the liquidator the general lien cannot be claimed (l) The same principle applies in the case of the bankruptcy of an owner who has entered into an agreement giving a general lien (m)

### Extension of particular to general lien

13 A particular lien cannot be extended by agreement so as to become a general lien against the goods of strangers (n)

## Part IV—Particular Lien

### SECT 1—In General

### Nature.

14 A particular lien is the right to retain goods until all charges incurred in respect of those goods have been paid if the owner of the goods is willing to satisfy such charges the goods cannot be retained until payment of the general balance due to the person having the particular lien (o)

(j) See title COMPANIES Vol V pp 168—170

(k) *Hurkman v Shawcross* (1791) 6 Term Rep 14 In ascertaining the extent of the lien the notice will be construed strictly (*Cumpton v Hinch* (1836) 2 Bing (N C) 449)

(l) *Wiltshire Iron Co v Great Western Rail Co* (1811) L R 1 Q B 101 716 Ex Ch but see *Re Northfield Iron and Steel Co Ltd* (1866) 14 L J 690 and *Re Llangennech Coal Co* (1867) 36 L R 470 in both of which cases the lien was upheld Where a trading company had usually shipped goods abroad under bills of lading which gave the shipowners a general lien for freight etc and after an order in a debenture holders action appointing a receiver and manager of the trading company such receiver and manager had shipped goods under a similar bill of lading it was held that the shipping company had no general lien which would extend to freight due before the appointment of the receiver because he was a different person from the trading company being an agent for the debenture holders and because no leave to give such lien had been granted by the court (*Whinney v Moss Steamship Co Ltd* [1910] 2 K B 813 C A) see also *Le Favy's Patent Felted Paper Co* (1856) 1 Ch D 631

(m) *Re Bushell Ex parte Great Western Rail Co* (1862) 22 Ch D 470 C A but see *Hauthorn Newcastle upon Tyne and North Shields Rail Co* (1840) 3 Q B 734 n

(n) *Oppenheim v Russell* (1807) 3 Bos & P 42 *Wright v Snell* (1822) 5 B & Ald 310 *Leuckhart v Leaper* (1836) 3 Bing (N C) 99, 107, and see titles BAILEY Vol I, p 545 CARRIERS Vol IV p 93

(o) *Jones v Lorteton* (1842) 5 M & W 675

**15** Particular liens have always been allowed by the common law where a party was obliged by law to receive goods, in such cases as the law imposed the burden it also gave the power of retaining for the indemnity of the party so receiving (*p*) The right of particular lien was subsequently extended to all cases where a person has expended labour and skill in the improvement of a chattel bailed to him (*q*)

SECT 1  
In General  
Cases in which allowed.

Where a particular lien is claimed by a person who is obliged to receive the goods it is immaterial to whom they belong (*r*) unless the person receiving them knows that the person from whom he received them was a wrongdoer (*a*)

Goods of stranger

Particular liens being consistent with the principle of natural equity are favoured by the law, which is construed liberally in such cases (*b*)

Favoured by law

As general liens may arise on an established course of dealing between the parties or by express contract it follows, *a fortiori* that particular liens may arise in the same manner (*c*)

Established course of dealing

## SECT 2—Persons under Legal Obligation to do Services

**16** A common carrier (*d*) is under a legal obligation to carry goods (*e*) and by way of compensation for such obligation is entitled to retain the goods until the charge for carriage is paid (*f*)

Common carriers

(*p*) *Naylor v Mangles* (1794) 1 Esp 109 *Robins & Co v Gray* [1892] 2 Q B 501 C A *Lushforth v Hadfield* (1805) 6 East 519 520 *Loré v Grenauilh* (1803) 2 Ld Raym 966

(*q*) *Jackson v Cummins* (1839) 5 M & W 342 *per* PARKE B at p 349 quoting *Bevan v Waters* (1828) Mood & M 235 (training of a racehorse) and *Scarfe v Morgan* (1838) 4 M & W 270 (a mare covered by a stallion) Labour must be expended to give this lien see p 12 *post* and title BAILMEN r Vol 1 p 561 Thus persons putting out a fire on a ship have a particular lien on goods saved (*Hartford v Jones* (1698) 1 Ld Raym 393) but the mere finding and taking care of an article gives no right to a lien on it (*Nicholson v Chapman* (1895) 2 Hy Bl 254)

(*r*) *Robins & Co v Gray supra* see title CARRIERS Vol IV p 6 INNS AND INNKEEPERS Vol XVII pp 306 *et seq* otherwise where a particular lien is claimed the work must be done at the request of the owner of the goods see p 12 *post*

(*a*) *Johnson v Hill* (1822) 3 Stark 172

(*b*) *Jackson v Cummins supra Scarfe v Morgan supra per* PARKE B at p 283

(*c*) Cross Law of Lien 27 The express contract for a lien must be shown with sufficient certainty (*Pobertson v Showler* (1845) 13 M & W 609)

(*d*) As to what persons are common carriers see title CARRIERS Vol IV p 2

(*e*) As to the extent of a common carrier's obligations see title CARRIERS, Vol IV, pp 6 *et seq*

(*f*) See title CARRIERS Vol IV pp 92—94 The lien is not enjoyed by carmen or furniture removers who are not common carriers see *Electric Supply Stores v Gaywood* (1909) 100 L T 855 *Hirst v Page & Co* (1891) 7 T L R 537 The right may be enlarged by agreement (*Kinnear v Midland Rail Co* (1868) 19 L T 387 which case is also an authority for the application of the *quodam generis* doctrine to lien) For form of agreement see *Encyclopædia of Forms and Precedents*, Vol III pp 169 201 As to the right of a master of a ship to a lien for freight see *Anon.* (1701) 12 Mod. Rep 447, 511, *Artaza v Smallpiece* (1893) 1 Esp 23 and on luggage for passage money, see *Wolf v Summers* (1811) 2 Camp 631 and as to the general rights of a master of a ship, see title SHIPPING AND NAVIGATION

**SECT 2**  
**Persons**  
**under Legal**  
**Obligation**  
**to do**  
**Services**  
**—**  
**Innkeepers**

So a person who keeps a common inn, inasmuch as he is under obligation to receive and afford proper entertainment to everyone who offers himself as a guest and safely and securely to keep the goods brought by the guest, has a lien upon such goods until the expenses of the guests food and lodging are discharged (g)

**SECT 3 —Persons who have done Work on Particular Chattels**

**Lien for work**  
**done**

**17** It is a common law principle that if a man has an article delivered to him on the improvement of which he has to bestow trouble or expense he has a right to retain it until his charge is paid (h). Thus the artificer to whom goods are delivered for the purpose of being worked up, the farrier by whose skill an animal is cured of disease, and the horse breaker by whose skill an animal is rendered manageable have liens on the chattels in respect of their charges (i). The lien only applies to the chattel produced or on which the work is done (k) but where the article upon which the work is to be done is sent in different parcels and at different times there is a lien upon the whole if it is all done under one contract (l).

**Work must be**  
**completed**

**18** The work must be done by the order or at the request of the owner or of some person authorised by him (m) and must be completed (n), but if completion is prevented by the owner the lien arises for the work actually done (o). Work must be done or skill expended in improving the chattel (p).

(g) See title INNS AND INNKEEPERS Vol XVII pp 323 et seq

(h) *Devan v Waters* (1828) 3 C & P 520 As to a workman's lien see title BAILEMENT Vol I p 561

(i) *Scarfe v Morgan* (1838) 4 M & W 270 per PARKE B at p 28

(k) *Hollis v Claridge* (1813) 4 Taunt 801 (a conveyancer has a lien on a drift not on all papers) *Bleaden v Hancock* (1899) 4 C & F 152 (a printer has a lien on engravings not on the plates from which engraving is made) and see *Marks v Lahee* (1837) 3 Bing (N C) 409 As to the lien of a solicitor on property recovered or preserved see title SOLICITORS

(l) *Blake v Nicholson* (1814) 8 M & S 161

(m) *Hollis v Claridge supra* *Hiscox v Greenwich* (1802) 4 Esp 174 *Hussey v Christie* (1808) 9 East 426 *Buxton v Baughan* (1854) 6 C & P 674 *Castellani v Thompson* (1862) 13 C B (N S) 105 A sub contractor gets such a lien through a contractor against the real employer who approves of the sub contract (*Bellamy v Davey* [1891] 3 Ch 540) and where a person hiring a chattel and undertaking to keep it in repair, sends it to be repaired the repairer has a particular lien on the chattel for his charges against the owner (*Keene v Thomas*, [1905] 1 K B 136) See also *Re Union Cement and Brick Co Ex parte Fulbrook* (1869) 4 Ch App 627 (no lien for costs in favour of solicitor on documents used in winding up of a company as against a liquidator who is not the owner of them) and *Re Lawrence Bowker v Austin* [1894] 1 Ch 556 (no lien in favour of solicitors employed by a husband on marriage settlement as against the trustees) Where a servant, in the ordinary course of his employment (see title MASTER AND SERVANT) delivers his master's goods to a person for the purpose of doing work thereon such person has a lien for his charges but cannot transfer it to the servant, even though the servant pay his charges (*Hussey v Christie supra*)

(n) *Pinnock v Harrison* (1838) 3 M & W 532 per PARKE B at p 535

(o) *Lilley v Barnsley* (1844) 1 Car & Kir 344

(p) *Devan v Waters* (1828) 3 C & P 520, *Judson v Etheridge* (1833) 1 Cr

There is no distinction between an agreement to do the work for a stipulated sum and the implied contract to pay a reasonable sum, but, if there is a stipulated price to be paid at a particular time or in a particular manner, the workman cannot set up a lien inconsistent with his contract (q)

SMO 3  
Persons who  
have done  
Work on  
Particular  
Chattels

Sum payable  
Instances of  
particular  
liens.

19 The following persons have been held to be entitled to particular liens for labour or expenditure upon chattels entrusted to them—an accountant upon the books of account, for work done before the bankruptcy of the owner (i), an arbitrator upon the award, for his fees (s), an architect, upon plans prepared by him for his charges (t) an auctioneer upon the goods sold, for the price and for the charges of sale and commission (a), a calico printer upon goods in his possession for printing (b), a coachmaker, upon a carriage for the cost of repairs (c) commissioners for taking acknowledgments (d), upon the deed acknowledged the certificate of execution and the affidavit of verification for their fees (e) a conveyancer upon a draft settled, or opinion written, by him (f) a dyer, upon goods dyed by him (g), engineers, upon a baige for putting in the machinery (h) a farrier upon a horse cured of disease (i), a fuller on cloth dressed by him (j), a horse breaker

& M 743 *Forth v Simpson* (1849) 13 Q. B. 680 see *Donatty v Croucher and Kelly* (1826) 11 Moore (C. P.) 479 *Orchard v Rackstraw* (1854) 9 C. L. 698 An auctioneer to whom a mortgage deed was delivered to enable him to demand the money due was held to have no lien because there was no work to be done on the deed (*Sanderson v Bell* (1834) 2 Cr. & M. 304) An agistor of cows has no lien see p 6 ante *Prentice v Taylor* (1859) 1 F. & F. 469 and title ANIMALS Vol I p 387

(g) *Chase v Westmore* (1816) 5 M. & S. 180 *Blake v Nicholson* (1814) 3 M. & S. 167

(r) *Re Hall Ex parte Southall* (1848) 12 Jur. 576 per KNIGHT BRUCE V C at p 577

(s) *L. v South Devon Rail Co* (1850) 15 Q. B. 1043 *Re Coombs and Fernley* (1850) 4 Exch. 839 per PARKE B at p 841 and see title ARBITRATION Vol I p 472

(t) *Hughes v Lenny* (1839) 5 M. & W. 183 and see title BUILDING CONTRACTS ENGINEERS AND ARCHITECTS Vol III p 306

(a) *Williams v Millington* (1788) 1 Hy. Bl. 81 *Coppin v Craig* (1816) 1 Taunt. 243 and see title AUCTION AND AUCTIONEERS Vol I p 517

(b) A calico printer has also a general lien for work done in his actual business see note (j) p 8 ante

(c) *Houlkitch v Milne* (1800) 3 Esp. 86, per Lord ELDON C.J. *Howes v Ball* (1821) 7 B. & C. 481

(d) Under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4 c. 74)

(e) *Ex parte Grove* (1836) 3 Bing. (N. C.) 304

(f) *Hollis v Claridge* (1815) 4 Taunt. 607 *Steadman v Hockley* (1846) 15 M. & W. 553

(g) *Savill v Barchard* (1801) 4 Esp. 53 *Green v Farmer* (1768) 4 Burr. 2214 *Bennett v Johns* n (1784) 3 Doug. (K. B.) 387 For many years dyers endeavoured to establish a right to a general lien but it appears that this was only established in particular districts and not everywhere see Cross Law of Lien 337 *Cloze v Waterhouse* (1802) 6 East 523, n

(h) *Re Westlake Ex parte Hallowby* (1881) 16 Ch. D. 604

(i) *Rushforth v Hadfield* (1806) 7 East 224 per Lord ELLENBOROUGH C.J. at p 229 (by implication when he points out that a farrier is not entitled to a general lien for shoeing a horse), *Scarfe v Morgan* (1838) 4 M. & W. 210 per PARKE B at p 284

(j) *Rose v Hart* (1818) 8 Taunt. 499 In *Sweet v Pym* (1800), 1 East 4 it is stated that by the custom of Exeter a fuller has a general lien



SECT 3  
Persons who  
have done  
Work on  
Particular  
Chattels

upon a horse for the cost of breaking it in (*k*) a horse trainer, upon a horse, both for keep and training, unless by contract or custom the owner has rights of user inconsistent with the continued possession of the trainer (*l*), a miller, upon flour or corn, for the cost of grinding (*m*) the owner of a stallion upon a mare for the cost of covering (*n*) a parliamentary agent upon books and papers in his hands (*o*), a printer upon copies of a book for his costs of printing it (*p*), a shipwright, upon a ship for building or repairing it (*q*), and a tailor, upon clothes for the price (*r*)

## Part V—Equitable Lien

### SECT 1—Definition and Nature

F equitable  
lien

**20** An equitable lien may be defined as an equitable right conferred by law upon one man to a charge upon the real or personal property of another until certain specific claim have been satisfied

Distinguished  
from  
equitable  
charge and  
common law  
lien

It differs from an equitable charge inasmuch as the latter is a right founded on contract whereas an equitable lien is founded on the principle of equity that he who has obtained possession of property under a contract for payment of its value will not be allowed to keep it without payment (*s*) but so far as regards their effect there is no distinction between an equitable lien and an equitable charge and both are liable to be defeated under the Statutes of Limitation (*t*)

An equitable lien differs also from the common law lien in that the latter is founded on possession and, except as modified

(*k*) *Judson v Etheridge* (1833) 1 Cr & M 143 *Scarfe v Morgan* (1838) 4 M & W 210 *per* PARKE B at p 28

(*l*) *Dean v Waters* (1828) 3 C & P 520 *Loth v Simpson* (1849) 13 Q. B 680 see p 6 *ante*

(*m*) *Re Matthews Ex parte Ockenden* (1854) 1 Alk 230

(*n*) *Scarfe v Morgan supra*

(*o*) *Ridgway v Lees* (1856) 25 L J (CH) 584

(*p*) *Blake v Nicholson* (1814) 3 M & S 161 see *Brook v Wentworth* (1797) 3 Anst 881 as to lien of publisher on author's copyright for disbursements

(*q*) *Ex parte Shank* (1754) 1 Atk 234 *Hoods v Russell* (1822) 5 B & Ald 942 *Re Strickland Ex parte Bland* (1814) 2 Rose 91

(*r*) *Blake v Nicholson supra*

(*s*) *Mackreth v Symmons* (1808) 15 Ves 329 Where the assignee of a bond debt charged upon real and personal estate has omitted to enforce payment out of the personal estate he is nevertheless entitled to a valid equitable lien on the real estate (*Justice v Fooks* (1887) 57 L T 868) The terms of a contract between the parties may however preclude the existence of lien (*Dean v Byrnes* (1864) 13 W R. 299)

(*t*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8, see title LIMITATION OF ACTIONS pp 33 *et seq post* The distinction between the equitable lien and the possessory lien in this respect must be noted see p 3, *ante* For the distinction between an equitable lien and a charge upon land within the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8, and a simple contract debt within the Limitation Act, 1623 (21 Jac 1 c 16) and the Mercantile Law Amendment Act 1866 (19 & 20 Vict c 97) s 14 see *Barnes v Glenister*, [1898] 2 Q B 223 See also title EQUITY, Vol XIII, p 92

by statute merely confers a right to detain the property until payment(u), whereas the former which exists quite irrespective of possession, confers on the holder the right to a judicial sale(v)

SECT 1  
Definition  
and Nature

## SECT 2—Vendor and Purchaser

### SUB SECT 1—Vendor's Lien

**21** A vendor of land (a) has an equitable lien on the land sold for the whole or part of the purchase money until actual payment (b) even where the purchase money is expressed to have been paid and received in the conveyance, when in fact it remains wholly or partly unpaid (c) The lien also extends to money advanced by an unpaid vendor for improvements (d) as well as to interest on such unpaid purchase money or advances or such parts thereof as remain unpaid from the time the lien comes into existence (e)

Vendor's lien

It is immaterial to the lien whether the purchase money is a sum in gross or an annuity on the life of the vendor (f) or is payable by instalments (g) unless a contrary intention is shown by the parties (h) The lien may arise although the purchase money is not payable until a future date for instance at a definite time after the vendor's death (i), and is not defeated by an agreement that the purchaser shall not without the consent of the vendor and the surety of the purchaser lease or assign the property until the original purchase price has been paid (h)

**22** The vendor's lien arises not only in the case of freeholds, but also where the property sold is of copyhold or leasehold

In what cases  
it arises

(u) See pp 25 26 post

(v) See p 27 post

(a) As to sale of land generally see title SALE OF LAND

(b) *Hearle v Botelers* (1604) Cary 35 *Clapman v Lanner* (1684) 1 Vern 267 *Mackreth v Symmons* (1808) 15 Ves 379 *Lynght v Edwards* (1816) 2 Ch D 499 506 *Kettlewell v Watson* (1864) 26 Ch D 501 C A *Idoloxfen v Moore* (1746) 3 Atk 212 *Coppin v Coppin* (1720) 2 P Wms 291 *Crilly v Callaghan* (1842) 5 I Eq R 20 *Hawkins v Gariner* (1804) 2 Sm & G 441

(c) *Saunders v Leslie* (1814) 2 Ball & P 509 *Winter v Anson (Iord)* (1873) 1 Sim & St 434 *Jersey (Earl) v Briton Ferry Floating Dock Co* (1869) L R 7 Eq 409 *Harrison v Southcote* (1711) 2 Ves Sen 389 393 *Austen v Halsey* (1800) 6 Ves 475 *Elliot v Edwards* (1802) 3 Bos & P 181 As to how far a receipt in a conveyance creates an estoppel see title STOPPES Vol XIII p 371 A direction to the common agent of both parties to pay the vendor out of moneys due by the agent to the purchaser is not equivalent to payment and does not affect the vendor's lien (*Wroth v Dawes* (1808) 4 Jur (ns) 386 *Yung v White* (1844) 7 Beav 506)

(d) *Re Baker and Harley Ex parte Linden* (1841) 1 Mont D & De G 428

(e) *Rose v Watson* (1864) 10 H L Cas 612 *Re Stucley Stucley v Kekewich* [1906] 1 Ch 67 C A and compare *Re Draz Savile v Draz* [1903] 1 Ch 781 C A The usual rate of interest allowed in equity is 4 per cent

(f) *Tardiff v Derughan* (1769) cited 1 Bro CC 423 *Richardson v M Causland* (1817) Beat 457 *Clarke v Royle* (1880) 3 Sim 499 *Matthew v Bowler* (1847) 6 Hare 110 *Remington v Deverall* (1790) 2 Anst 550

(g) *Naves v Naves* (1880) 15 Ch D 649

(h) *Buckland v Locknell* (1843) 13 Sim 406 *Dixon v Gayfere* (No 3) (1850) 21 Beav 115

(i) *Winter v Anson (Iord)* (1828) 3 Russ 498

(k) *Elliot v Edwards* (1802) 3 Bos & P 181

**SECT 2**  
**Vendor and**  
**Purchaser**

tenure (*l*) or chattels (*m*) or personal property generally (*n*), and binds not only the purchaser his heir, persons claiming under him as volunteers, and his creditors (*o*) but also those claiming under him for value who have equitable interests in the property (*p*) or have acquired the legal interest with notice of the non payment of the purchase price (*q*)

**Land**  
**acquired**  
**by public**  
**company**

**23** The lien also arises in the case of the acquisition of land by a public company either compulsorily or by agreement for the purchase price (*r*) for compensation for severance when it forms part of the purchase money (*s*) for damages for non construction of accommodation works (*a*) and for the costs of an action for specific performance (*b*) On the other hand a vendor has no lien for his costs upon the sum deposited by the company (*c*) when the condition of the bond has been performed (*d*) A railway company selling its superfluous lands has probably no lien for the price (*e*)

**SUB SECT 2 — Purchaser's Lien**

**Purchaser's**  
**lien.**

**24** A purchaser of land has an equitable lien on the vendor's interest in the land agreed to be sold for all sums paid by him

- (*l*) *Winter v Anson* (Lord) (1828) 3 Russ 448 492 *Matthew v Boulter* (1847) 6 Hare 110 *Illiot v Edwards* (1802) 3 Bos & P 181  
 (*m*) *Le Vulcan Ironworks Co* [1885] W N 37 (trade machinery)  
 (*n*) *Davies v Thomas* [1900] 2 Ch 462 C A *Re Stucley Stucley v Kekewich* [1906] 1 Ch 67 C A *Collins v Collins* (No 2) *Downes v Downes* (1862) 31 Law 346 *Re Albert Life Assurance Co Ex parte Western Life Assurance Society* (1840) L R 11 Eq 164 178  
 (*o*) *Grant v Mills* (1813) 2 Ves & B 306 309 *Iuwell v Heels* (1773) Amb 724 726 *Blackburn v Gregson* (1785) 1 Bro C C 420  
 (*p*) Unless the circumstances are such as to give the persons acquiring equitable interests a better equity than the vendor has see *Rice v Rice* (1853) 2 Drew 73 title EQUITY Vol XIII pp 79 80  
 (*q*) *Filiot v Edwards supra* *Maccreth v Symmons* (1808) 15 Ves 329 *Gibbons v Baddall* (undated) 2 Eq Cas Abr 3rd ed 682 *Walker v Preswick* (1755) 2 Ves Sen 622 *Cator v Pembroke* (Earl) (1883) 1 Bro C C 301 *Harris v Tubb* (1889) 42 Ch D 79 *Grant v Mills supra* *Bowles v Rogers* (1800) cited 6 Ves 95 and see title EQUITY Vol XIII p 79  
 (*r*) *Walker v Ware Hadham and Buntingford Rail Co* (1865) L R 1 Eq 195 *Winchester (Bishop) v Mid Hants Rail Co* (1867) L R 5 Eq 17 *Wing v Tottenham and Hymptstead Junction Rail Co* (1869) 3 Ch App 740 *Marshall v Scarborough and Whitby Rail Co* [1889] W N 73 *Lycett v Stafford and Uttoxeter Rail Co* (1872) L R 13 Eq 261 see also *Re Stucley Stucley v Kekewich supra* For the law relating to acquiring land by agreement or by compulsory purchase see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 57 *et seq*  
 (*s*) *Walker v Ware Hadham and Buntingford Rail Co supra*  
 (*t*) *St Germans (Earl) v Crystal Palace Rail Co* (1871) L R 11 Eq 568  
 (*u*) *Winchester (Bishop) v Mid Hants Rail Co supra*  
 (*v*) Under the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s 80 see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol VI p 103 Nor does the lien cover the costs of a statutory arbitration (*ibid*, p 86)  
 (*w*) *Ex parte Stevens* (1848) 2 Ph 772 *Re Neath and Brecon Rail Co* (1874) 9 Ch App 263  
 (*x*) *Re Thelwray and Young's Contract* (1888) 40 Ch. D 34.

under the contract on account of the purchase money, together with interest thereon (f) and such lien will extend to interest paid on the unpaid balance of the purchase money (g) and also to the costs of an action for specific performance (h) as well as to the purchaser's costs of investigating title where a good title is not shown to the property contracted to be sold (i), including the costs of a summons under the Vendor and Purchaser Act 1874 (k). In all these cases the lien is the same in effect as if the vendor had executed a mortgage of the property in favour of the purchaser for the amount covered by the lien (l). But a purchaser has no lien for moneys paid by him under an illegal contract (m).

SECT 2  
Vendor and  
Purchaser

The lien is not lost by the purchaser though he has destroyed his right to specific performance by delay in completing the purchase, so that where a vendor has become bankrupt prior to completion the purchaser can still enforce his lien to the extent of his deposit (n). But a purchaser who obtains damages in lieu of specific performance is not it seems entitled to a lien for such damages (o).

Not lost by  
delay

The lien is available also to a sub purchaser for what he has paid where the original purchaser has resold before completion upon the interest which such original purchaser acquired by part payment of the purchase money (p).

Sub  
purchaser

When the vendor is a mortgagee selling under a power of sale the lien does not exist against the mortgagor but only against the mortgagee to the extent of his interest in the property but if the vendor is a trustee it may affect the interest of his *cestui que trust* (q). The lien will not however arise in favour of a purchaser from vendors known to him to be trustees who leaves part of the purchase money in the hands of one of them under his absolute control and without the consent of the co-trustees or the beneficiaries (r).

Inducary  
vendors

(f) *Burgess v Wheate* A G v *Wheate* (1759) 1 Eden 177 211 *Wythes v Lee* (1856) 2 Jur (N S) 130 *Westmacott v Robins* (1864) 4 De G F & J 390 399 O A *Re v Watson* (1864) 10 H L Cas 672 *Aberaman Ironworks v Wickens* (1868), 4 Ch App 101 *Rodger v Harrison* [1883] 1 Q B 161 C A *Levy v Stogden* [1898] 1 Ch 478 *Whitbread & Co Ltd v Watt* [1902] 1 Ch 835 O A. It seems that the purchaser may have a lien on an incomplete conveyance to him for the amount of his deposit (*Ozenham v Esdaile* (1829) 3 Y & J 262).

(g) *Rose v Watson supra*

(h) *Middleton v Magnay* (1864) 2 Hem & M 233 *Turner v Marriott* (1867) 1 R 3 Eq 744 see title SPECIFIC PERFORMANCE

(i) *Re Yelding and Westbrook* (1856) 31 Ch D 344 *Astion v Hewett* [1904] W N 21

(k) 37 & 38 Vict c 78 see *Re Burneaux and Asrd's Contract* [1906] W N 215. As to the purchaser's lien on his purchase money paid into court for compensation for the vendor's delay in giving possession see *Thomas v Buxton* (1869) 1 L R 8 Eq 120.

(l) *Rose v Watson, supra* at p 683

(m) *Ewing v Osbaldeston* (1837) 2 My & Cr 53, 58

(n) *Levy v Stogden supra*

(o) *Cornwall v Henson*, [1900] 2 Ch 298 305 O A

(p) *Aberaman Ironworks v Wickens supra*

(q) *Wythes v Lee* (1855) 3 Drew 396

(r) *White v Wakefield* (1835) 7 Sim 401

**SECT 2**  
**Vendor and Purchaser**

Property  
affected by  
lien

Transfer of  
lien

**25** The purchaser's lien, like the vendor's lien, is not confined to land alone, but extends also to personal property (s) and attaches from the moment of payment, provided, of course that the sale is not rescinded through the purchaser's own default (t)

**SUB SECT 3 —Transfer of Vendor's and Purchaser's Lien**

**26** The benefit of the lien of a vendor or purchaser may be transferred even by parol (a) but the assignee will take subject to any prior charge of a similar nature which may have been created by the incumbrancer (b) unless the latter be cognisant of though not a party to the assignment in which case he would be taken to have acquiesced in the assignment and would be bound by it (c) On the bankruptcy of a party entitled to a lien his interest therein passes to his trustee (d) The benefit of a lien may be assigned with the debt in respect of which it arises (e)

**SECT 3 —Partnership Lien**

Partnership  
lien.

**27** On the dissolution of a partnership by the death bankruptcy or retirement of a partner the personal representative of the deceased the trustees of the bankrupt and the retiring partner respectively and on the other hand the solvent or continuing partners have a lien on the partnership estate for the satisfaction of all demands arising out of the partnership business prior to the dissolution (f) including consideration money paid under a partnership deed obtained by misrepresentation or fraud (g) or for allowances or payments agreed to be made on the dissolution (h)

(s) *Swainston v Clay* (1863) 3 De G J & Sm 508 069 C A (where the purchaser of an unfinished ship to be completed by the vendor under a contract by which an advance made to him was to be taken as part payment of the purchase-money was given a lien for the advance as against the vendor's trustee in bankruptcy) *Winter v Anson* (Lord) (1898) 3 Russ 488 *Matthew v Bowler* (1847) 6 Hare 110 *Elliot v Edwards* (1802) 3 Bos & P 181

(t) See p 31 post

(a) *Dryden v Frost* (1838) 3 My & Cr 670 see also *White v Wakefield* (1830) 7 Sim 401 *Burn v Carvalho* (1839) 4 My & Cr 690 *Morrell v Wotten* (1852) 16 Beav 197 As to extinguishment of equitable lien see p 30 post

(b) *Porter v Hubbart* (1873) 3 Rep Ch 43 [78] *Matthews v Wallingyn* (1898) 4 Ves 118 *Clambers v Goldwin* (1804) 9 Ves 204 *Mangles v Dixon* (1802) 3 H L Cas 102 *Muclesfield (Earl) v Fitton* (1883) 1 Vein 168 and compare title CHARGES in ACTION Vol IV pp 386 et seq

(c) *Jamieson v English* (1820) 2 Mol 337

(d) *Hudson v Granger* (1821) 5 B & Ald 27 See title BANKRUPTCY AND INSOLVENCY Vol II pp 109 et seq

(e) *Bull v Faulkner* (1848) 2 De G & Sm 772

(f) *West v Skipp* (1760) 1 Ves Sen 239 456 *Skipp v Harwood* (1747), 2 Swan 586 *Ex parte Williams* (1800) 11 Ves 3 *Ex parte King* (1810) 17 Ves 115 *Kelly v Hutton* (1868) 3 Ch App 703 *Harvey v Crickett* (1816) 5 M & S 336 *Hayes v Dundason* (1848) 2 Exch 741 per PARKE B at p 740 *Aberdare and Plymouth Co v Hankey* (1857) 3 F L R 493 see Partnership Act 1890 (53 & 54 Vict c 39) s 39 and title PARTNERSHIP It seems that there is no lien as between persons who are merely part owners (*Re Leslie Leslie v French* (1883) 23 Ch D 552 563) or co adventurers (*Re Boggs, Ex parte Gemmel* (1843) 3 Mont D & De G 198) and see p 20 post

(g) *Mycock v Beaton* (1849) 13 Ch D 384 *Binney v Mutrie* (1886) 12 App Cas 160 165 P C see Partnership Act 1890 (53 & 54 Vict c 39) s 41

(h) *Ex parte Rowlandson* (1813) 2 Ves & B 172 The lien does not cover

but this lien is confined to the assets of the partnership existing at the date of the dissolution (i)

SECT 3  
Partnership  
Lien

28 The existence of the lien does not affect *bonâ fide* purchasers or mortgagees of the specific assets of the partnership from a continuing or surviving partner (h) but the purchaser of the share of a partner in the partnership takes subject to the lien (l)

Extent of  
lien

#### SECT 4—Lien for Expenditure on the Property of Another

##### SUB SECT 1—In General

29 A person who has expended money for the benefit of another or on property in which he has no interest has as a rule, no lien in respect of such expenditure against such other person or against the owner of the property (m). The maritime doctrine of salvage does not apply in such cases (n) and even where the person making the payment has an interest a lien not expressly stipulated for can only arise by virtue of a trustee's right to be indemnified out of the trust estate for expenditure in its preservation (o), or by subrogation (p) or by reason of an incumbrancer's

Expenditure  
on property  
of another

liabilities not arising out of the partnership such as private loans by one partner to another (*Ryall v Rowles* (1750) 1 Ves Sen 348) but it extends to partnership moneys borrowed by one of the firm (*Meliorucci v Royal Exchange Assurance Co* (1878) 1 Eq Cas Abr 5 *Craft v Pyke* (1733) 3 L Wms 180)

(i) *Payne v Hornby* (1858) 25 Beav 280. This view however is contrary to that held by Lord HARDWICKE who in two cases arising out of the same transaction decided that the lien of a partner on dissolution was not limited to the stock brought in but extended to everything coming in lien during the continuance or after the determination of the partnership (*Skipp v Harwood* (1747) 2 Swan 586 *West v Ship* (1800) 1 Ves Sen 239 244 456) and see *Pennell v Deffell* (1853) 4 De G M & G 372 C A per TURNER L J at p 368 and title PARTNERSHIP. In *Sticken v Dawson* (1848) 17 L J (CH) 282 286 the parties agreed that the property should be considered to have remained unchanged

(k) *Re Langmead's Trusts* (1855) 7 De G M & G 353 C A. *Re Bourne Bourne v Bourne* [1906] 2 Ch 427 C A

(l) *Carander v Bulteel* (1873) 9 Ch App 79

(m) *Burridge v Row* (1842) 1 Y & C Ch Cas 183 *Wallis v Smith* (1882) 21 Ch D 243 C A. *Re Leslie Leslie v French* (1883) 23 Ch D 552 *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 C A. *Strutt v Tippet* (1890) 62 L T 475 C A see however *Re Pike Burke v Burke* (1888) 23 L R Ir 9 and *Peruvian Guano Co v Dreyfus Brothers & Co* (1887) reported [1892] A C 100 n, per Lord MACNAGHTEN at p 174 (as to cases of trover and trespass where the owner has been required by the court to make an allowance in respect of the expenditure) compare *Hooper v Cooke* (1856) 25 L J (CH) 467 (no lien for moneys expended in repair of dilapidated premises by owner of rentcharge as against owner of subsequent rentcharge)

(n) *Falcke v Scottish Imperial Insurance Co supra Murray v Pinkett* (1846) 12 Cl & Fin 764 H L. *Burridge v Row, supra per KNIGHT BRUCE V O* at p 191 *Clack v Holland* (1855) 19 Beav 262 per ROMILLY M R at p 277 *Hartfort v Jones* (1698) 1 Ld Raym 393 *Nicholson v Chapman* (1739) 2 Hy Bl 254 *Castellan v Thompson* (1862) 13 C B (N S) 105 *Atchison v Lohre* (1879) 4 App Cas 755. As to salvage see title SHIPPING AND NAVIGATION

(o) See title TRUSTS AND TRUSTEES and p 21 *post*. As to the lien of trustees and members of committee of a club on the property of the club see title CLUBS Vol IV p 419

(p) As to the doctrine of subrogation generally, see title EQUITY Vol XIII p 149 and see title INSURANCE, Vol XVII, p 563. For the application of the doctrine to suretyship see title GUARANTEE, Vol XV pp 509 *et seq*, and see *ibid*, pp 522 523

**NOTE 4**  
**Idea for**  
**Expenditure**  
**on the**  
**Property of**  
**Another**

Examples of  
 no lien by  
 expenditure

Mortgagor's  
 lien

right to add to his charge money properly expended on his security (q)

Thus a tenant in common has no lien against the share of his co-tenant for payments made for the benefit of the estate (r) nor one joint owner for money lent to another (s) nor a tenant for life as against the remainderman (t) nor a bankrupt for premiums paid on a life policy after the bankruptcy as against his trustee in bankruptcy (u) nor a firm against property purchased by one partner and paid for out of the partnership money (a) nor a person who has expended money on property which he has bought without a title (b) nor a solicitor who has lent money in the name of his client, who is an executor to pay off a debt on the testator's estate (c) nor a guardian who has discharged an incumbrance on an infant's estate (d), nor a subsequent mortgagee as against a prior incumbrancer (e)

Expenditure by a mortgagor on the mortgaged property does not give him a lien on it in priority to the mortgagee (f) Thus a mortgagor who pays a premium on a policy acquires no lien against the mortgagee (g) nor does a mortgagor of renewable leaseholds who buys the reversion acquire a lien for the purchase money as against the mortgagee of the lease (h) and

(q) *Re Leslie Leslie v French* (1893) 23 Ch D 502 *Claib v Holland* (1800) 9 Be 62 *Gill v Downing* (1814) 30 L T 151 and see p 21 *post* and the cases cited in title INSURANCE Vol XVII pp 047 note (u) 063 note (t) As to the position of a mortgagee in this respect see title MORTGAGE

(r) *Ex parte Young* (1813) 2 Ves & B 242 *Re Nicholson Ex parte Harris* n (1814) 2 Rose 76 *Re Drury and Hudson Ex parte Leslie* (1833) 3 L J (MCY) 4 *Green v Briggs* (1848) 6 Hare 395 401 *Kay v Johnston* (1806) 21 Beav 536 overruling *Doddington v Hallet* (1750) 1 Ves Sen 497 and see *Leigh v Dickeson* (1864) 15 Q B D 60 C A *Johnson v Wild* (1890) 44 Ch D 146 but in partition actions allowance can be made for such improvements see titles EQUIT Vol XIII p 41 PARTITION

(s) *Kay v Johnston supra*

(t) *Caldecott v Brown* (1842) 2 Hare 144 *Pennell v Millar* (1857) 23 Beav 172 *Floyer v Bankes* (1869) L R 8 Lq 115 *Norris v Caledonian Insurance Co* (1869) 1 R 8 Eq 127 unless he makes his advances at the request of the trustees of the settlement (*Lodd v Moorhouse* (1874) L R 19 Lq 69)

(u) *Tapster v Ward* (1909) 101 L T 003 C A

(a) *Walton v Butler* (1861) 29 Beav 428

(b) *Ridgway v Roberts* (1844) 4 Hare 106

(c) *Christian v Field* (1842) 2 Hare 177

(d) *Hooper v Eyles* (1705) 2 Vern 480

(e) *Re Power's Policies* [1809] 1 I R 6 C A *Landowners West of England and South Wales Land Drainage and Inclosure Co v Isiford* (1881) 16 Ch D 411 433 There are however certain exceptions in favour of a person who advances money to save property from destruction for the benefit of all who are interested in it In *Angell v Bryan* (1845) 2 Jo & I at 763 SUGDEN L C said There are cases in which the court has properly given a salvage creditor priority over all other incumbrancers See also *Sheurman v British Empire Mutual Life Assurance Co* (1812) L R 14 Eq 4, overruled by *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 C A and note (a) p 22 *post*

(f) *Langton v Langton* (1856) 7 De G M. & G 30 41 C A *Saunders v Dunman* (1878) 7 Ch D 825 *Drew v Josolyne* (1887) 18 Q B D 590 C A

(g) *Falcke v Scottish Imperial Insurance Co supra* *Norris v Caledonian Insurance Co* (1869) L R 8 Eq 127 As to the respective rights of a mortgagee and mortgagor to the proceeds of a policy of insurance against fire, see title INSURANCE Vol XVII p 522 Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41), s 23 (4) *Garden v Ingram* (1802) 23 L J (CH) 478

(h) *Leigh v Burnetts* (1885) 29 Ch D 231

the liquidator of a company who, under the sanction of the court spends money to secure a fund which the company has mortgaged, acquires no lien as against the mortgagee for the money so spent (i)

SECT 4  
Lien for  
Expenditure  
on the  
Property of  
Another

Examples of  
lien by  
expenditure

30 In certain cases a person who has expended money on property under the erroneous belief that he is entitled to or has an interest in it will be allowed a lien (k). So a person who takes goods out of pawn at the request of the owner has a lien on the goods for the moneys advanced to get them out of pledge (l) and where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it such person is entitled to a lien (m), but no lien in such case will arise unless it can be shown that the owner knows that the stranger is acting in the belief that he has a title and further that such belief is founded on an erroneous impression of facts (n)

#### SUB SECT 2—Trustees and Incumbrancers

31 Where trustees and incumbrancers and even in some cases creditors, though their debts be disputed (o) and limited owners (p) have made payments for the redemption of property or for fines on renewal of leases or other payments to save property from destruction, for the benefit of all persons interested in its preservation a lien will arise in their favour for the amount of the expenditure against the property in priority to all other claims (q). In the case of a tenant for life who has made such payments it makes no difference whether the trustees of the settlement could or could not have

Trustees and  
mortgagees  
lien

(i) *Lee and Chapman's Case* (1885) 30 Ch D 216 225 C A and see *Ir Ormerod Grierson & Co* [1890] W N 217

(j) *Neeson v Clarkson* (1845) 4 Hare 97 (husband and wife) *Iudlow v Grayall* (1822) 11 Price 58 (intending purchaser) *Muddleton v Murray* (1864) 2 Hem & M 233 (intending lessee) see *Rennie v Young* (1858) 2 De G & J 136 C A

(k) *Jones v Cliff* (1833) 5 O & P 560

(l) *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72 see however an instance to the contrary *Millard v Harvey* (1864) 10 Jur (N S) 1167

(m) *East India Co v Vincent* (1740) 2 Atk 83 *Dann v Spurrier* (1802) 7 Ves 231 *Beaufort (Duke) v Patrick* (1803) 17 Beav 60 *Dillwyn v Llewellyn* (1862) 4 De G F & J 517 *Ramsden v Dyson* (1866) L R 1 H L 129 *Pivmer v Wellington Corporation* (1884) 9 App Cas 699 P C *Falke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 242 C A For the law on this subject as between husband and wife see title HUSBAND AND WIFE Vol XVI p 403

(n) *Manlove v Bale and Bruton* (1668) 2 Vern 84 *Lacon v Mertins* (1443) 3 Atk 1 *Hamilton v Denny* (1809) 1 Ball & B 199 *Jones v Jones* (1846) 3 Hare 440 *Fetherstone v Mitchell* (1846) 9 I Eq R 480 See however the observations in *Re Leslie Leslie v French* (1883) 23 Ch D 552 564 As to trustees generally see title TRUSTS AND TRUSTEES and as to incumbrancers see title MORTGAGE

(p) *Todd v Moorhouse* (1874) L R 19 Eq 69 see note (i) p 20 ante

(q) See *Clarry v McAndrew*, (1863), 2 Moo P C C (N S) 216, per Lord KINGSDOWN, at p. 235 *Re Nepean's Settled Estate* [1900] 1 I R Eq 298 *Hope v Winter* (1709) 2 Eq Cas Abr 690 *Ansell v Bryan* (1840) 2 Jo & Lat 763 see also note (s) p 20 ante



**SECT 4**  
**Lien for**  
**Expenditure**  
**on the**  
**Property of**  
**Another**

raised the money by other means(r) But a trustee of a policy who makes or obtains such advances can neither obtain nor create such a lien, if he is, or in the due performance of his trust ought to be in possession of funds applicable for the purpose(s)

A married woman who out of her separate estate has paid the premiums on policies effected as a provision under her marriage settlement has a lien for such payments(t) and the assignee of a policy has a lien for the premiums paid after the assignment, together with interest thereon as against persons who have established a prior interest in the policy(a)

**SUB SECT 3—Managers Agents and Consignees**

**Managers**  
**and agents**  
**lien.**

**32** An equitable lien in the nature of a salvage lien is allowed to managers, whether they be part owners or not of works or estates for expenses properly incurred and advances made in the working or management of them(b)

**West Indian**  
**estates**

In the management of West Indian estates consignees and agents have a lien on the estate for advances made for the immediate purposes of the estate(c) or for the interest on incumbrances(d), and this lien is independent of any particular course of dealing between the parties(e) Moreover in the absence of *mala fides* mere injudicious or wasteful management by the manager appointed by the consignee will not affect the lien(f) The lien extends as well to the manager of the estate abroad as to the consignee at home of the produce(g), and whether they be appointed by the owner or trustee of the estate or by the court(h) and when appointed by the court they are entitled to such lien in the capacity of manager as well as in that of an officer of the court(i) Where however the estate is incumbered no lien will arise in favour of the owner, nor as a rule, in favour of the manager for such advances(h)

(r) *Lodd v Moorhouse* (1874) 1 R 19 Eq 69

(s) *Clack v Holland* (1854) 19 Beav 262 276 and see *Re Regents Canal Ironworks Co Ex parte Grissell* (1870) 3 Ch D 411 C A

(t) *Burridge v Row* (1844) 13 L J (OH) 173

(a) *West v Reid* (1843) 2 Hare 249 *Gill v Douning* (1874) 1 R 111 316 and see note (c) p 20 ante

(b) *Scott v Nesbitt* (1809) 14 Ves 438 per Lord JLDON LC at p 444 *Sykes v Whitfield* (1829) 1 Knapp 133 P C

(c) *Scott v Nesbitt supra* *Fraser v Burgess* (1860) 13 Moo P C C 314 *Sayes v Whitfield supra* and see *Re Tharp* (1852) 2 Sm & G 578 n per Lord St LEONARDS LC

(d) *Pe Greathed Ex parte Davis and Boddington Ex parte Chapman* (1859) Cust West Indian Incumbered Estates Acts 2nd ed 719 (also reported 3 Sol Jo 544) As to the power of sale of a conveyance of a West Indian estate see p 28 post

(e) *Simond v Hibbert* (1830) 1 Russ & M 719

(f) *Re Harriott Ex parte Lengelley* (1863) 8 L T 804

(g) *Fraser v Burgess supra* *Bertrand v Davies* (1862) 31 Beav 429 Of course the contract may be inconsistent with such a lien (*Re Feith's Estate Chambers v Davidson* (1866) L R 1 P O 296 see p 9 ante

(h) *Scott v Nesbitt supra* *Bertrand v Davies supra* *Daniel v Trotman* (1863) 1 Moo P O C (N S) 123 *Fraser v Burgess supra*

(i) *Morison v Morison* (1855) 7 De G M & G 214 O A *Fraser v Burgess supra* *Farguherson v Balfour* (1836) 8 Sm 210

(k) *Re Greathed, Ex parte Greathed (W S) Ex parte Greathed (John) Ex parte Fraser* (1859) Cust West Indian Incumbered Estates Acts 2nd ed. 235 As to the consignee or manager's claim when the estate is managed by the

as against the incumbrancers, unless the latter have acquiesced in the payments by the manager (l)

SECT 4  
Lien for  
Expenditure  
on the  
Property of  
Another

#### SECT 5—*Trustee's Lien for Costs, Charges and Expenses*

33 A trustee has an equitable lien on the trust estate for money properly expended thereon (a) and where the trust estate consists of a fund such lien will not be lost where the fund to which it attaches is ordered to be paid into court (b) A trustee who successfully defends an action brought for the purpose of setting aside a settlement has a lien for his costs against the trust estate notwithstanding that the settlement though originally valid becomes void under the Bankruptcy Acts (c) but a trustee has no lien for such costs if the defence to such an action is unsuccessful (d)

Trustees

#### SECT 6—*Solicitor's Equitable Lien*

34 A solicitor is entitled not only to a common law lien for his charges upon documents in his possession belonging to his clients but also to a lien of an equitable nature upon the fruits of judgments or orders obtained by him in favour of his clients in the suit in which he was employed for his costs in that suit (e)

Solicitors

#### SECT 7—*Maritime Lien*

35 The maritime law admits the validity of an equitable lien and if reasonable diligence be used and the proceeding be *bonâ fide* such lien will not be discharged by the sale of the ship, but may be enforced against purchasers without notice (f)

Maritime  
lien

#### SECT 8—*Miscellaneous*

##### SUB SECT 1—*In Cases of Waste*

36 Where a person who has but a limited interest in an estate has committed waste a lien arises for the amount of the injury

Waste.

court see *Morison v Morison* (1800) 7 De G M & G 214 C A *Lyre v Thompson* (1862) 30 Bouv 34 *Re Harp* (1800) 2 Sm & G 115 n *Frith v Harrison v Balfour* (1836) 8 Sim 210 *Shaw v Simpson* (1812) 1 Y & C Ch 132 and as to the effect of a manager's lien as against a remainder man see *Bertrand v Davies* (1862) 31 Beav 129 *Scott v Nesbitt* (1806) 14 Ves 438 per Lord Eldon L C at p 442

(l) *Fraser v Burrage* (1860) 13 Moo I C C 314 *Bertrand v Davies* sup

(a) *Darke v Williamson* (1858) 25 Beav 622 *Stanley v Lewis Evans v Stansur* (1886) 34 Ch D 410 *Budgett v Budgett* [1890] 1 Ch 202 There is no lien for costs incurred by reason of a breach of trust unauthorised by the cestui que trust (*Leedham v Chawner* (1865) 4 K & J 455)

(b) *Blenkinsop v Foster* (1808) 3 Y & C (Ex) 205

(c) *Re Holden Ex parte Official Receiver* (1887) 20 Q B D 43 and see titles BANKRUPTCY AND INSOLVENCY Vol II pp 275 et seq FRAUDULENT AND VOIDABLE CONVEYANCES Vol XV p 91

(i) *Re Butter with Ex parte Russell* (1882) 19 Ch D 564 602 C A *Re Holden Ex parte Official Receiver* supra See further title TRUSTS AND TRUSTEES

(e) *Welsh v Hie* (1819) 1 Doug (K B) 238 *Maclean v Mackintosh* (1891) 14 L R 318 and see *Re Cockrell's Estate* [1911] 2 Ch 318 For the various liens to which solicitors are entitled see title SOLICITORS

(f) *The Hong Munju* [1891] P 223 *Harmer v Bell The Bold Buccleugh* (1851) 7 Moo I C C 267 *Iatham v Andree* (1863) 1 Moo P C C (N S) 156 *The Europa* (1863) 9 Jur (N S) 699 *The Nymph* (1856) Sw 86 *The Luffort* (1855) 5 P D 15 and see further title SHIPPING AND NAVIGATION

SECT 8  
Miscellaneous

against the profits receivable by him during his term, in favour of the remainderman unless there has been collusion between the latter and the limited owner, and this lien is effective even against incumbrancers of the limited interest, though their securities were effected before waste was committed (g) This principle also applies, in the case of a trustee or executor who commits waste and such lien against any interest he may have under the will, is preferred to the right of his mortgagee (h)

SUB SECT 2—*In Cases of Misappropriation*

Misappropriation

**37** A mortgagee by deposit of deeds, from whom the mortgagor obtains possession of some of the deeds without the former's consent has a lien on all the deeds to which the debtor was entitled at the date of the deposit and it is immaterial whether the deeds were left in the mortgagor's custody as the solicitor of the mortgagee or otherwise or whether the recovery of the deeds was accidental or improper (i)

SUB SECT 3—*Covenants to Settle Specific Property*

Covenants to settle property

**38** Following the maxim that equity regards as done that which ought to be done (j) an equitable lien is raised in favour of the covenantee where a covenantor binds himself to charge property or the income of property already in his possession (k), or such as he may thereafter acquire of a specific kind or such as may be derived from a specific source (l) or such as he may point out by a subsequent instrument as that which was intended to be charged (m) and the result is the same although the property is not in possession where the covenant or agreement is founded on valuable consideration (n) Where the covenant is to make a charge at a future time when the covenantor will be in possession of lands acquired for the very purpose of the charge a lien will arise against them (o) and where the covenant is to pay money to trustees to be laid out in the purchase of lands or to purchase and settle lands and the covenantor purchases lands but settles neither them nor pays the money, the lands will be taken to have been purchased

(g) *Briggs v Oxford (Earl) Beavan v Oxford (Earl)* (1855) 1 Jur (N S) 817 and see title *STILLPMENTS*

(h) *Mcarris v Lovie* (1842) 1 Y & C Ch Cas 380 *Cole v Muddle* (1852) 10 Hare 186 *Barnett v Sheffield* (1852) 1 De G M & G 371 see also *Dowse v Corton*, [1891] A C 190 For the lien on the share of a defaulting executor in his testator's estate see title *EXECUTORS AND ADMINISTRATORS* Vol. XIV p 271

(i) *Mason v Morley* (1865) 11 Jur (N S) 459

(j) See title *EQUITY* Vol. XIII p 73 and as to the doctrine of performance see *ibid* pp 139 140

(k) *Legard v Hodges* (1792) 1 Ves 477 *Ravenshaw v Hollier* (1834) 7 Sim 3

(l) *Metcalfe v York (Archbishop)* (1836) 1 My & Cr 547 *Lyde v Mynn* (1833) 1 My & K 683 *Buller v Plunkett* (1860), 7 Jur (N S) 873

(m) *Watson v Sadleir* (1829) 1 Mol 585

(n) *Re Lucan (Earl)*, *Hardinge v Cobden* (1890) 45 Ch D 470 *Few v Winterton (Earl)* (1792), 3 Bro CC 489 493 (bond in ante-nuptial settlement to convey sufficient real estate to secure the wife a certain annuity in lieu of dower) *Prebble v Doghurst* (1818) 1 Swan 309 321 (ante-nuptial bond to settle property which the husband might become seised of)

(o) *Wellesley v Wellesley* (1839) 4 My & Cr 561

in performance of the covenant and will be subject to a lien in favour of the covenantee (p)

SECT 8  
Miscellaneous

**39** A covenant to convey lands of a certain value to the uses of a settlement does not create a lien on lands to which the covenantor was equitably entitled at the date of the covenant though actually conveyed to him afterwards (q)

Cases where no lien arises

A simple covenant or agreement to charge land does not create a lien upon the covenantor's real estate where no particular land is mentioned nor where the agreement is only for personal security with power to call for a real security nor where it otherwise appears to be intended to rely only upon the covenant (r) nor where there is no consideration (s) So that a covenant or promise in writing to give a security by mortgage or to sell lands when required (t) or a mere covenant to settle lands of a certain value (u) or at or within a certain time does not create a lien in favour of the covenantee or promisee Nor will a lien arise where the settlement contains only a power and not an express trust to purchase lands, nor on a covenant by a husband to settle (v)

## Part VI—Enforcement of Lien

### SECT 1—Legal Lien

**40** Legal or possessory liens merely confer on the holder of the goods or chattels in respect of which they are claimed a passive right to detain such goods or chattels until the debt is paid (a) and cannot be enforced by sale of the property held although there may be expense incurred in its retention a person who chooses to insist on his right of retainer may do so but he has no further right and must put up with any inconvenience which the retention may entail (b) The holder of the property as a rule, is not permitted to make any claim for the use of the place in

Remedy lies in case of possessory liens

Retainer as a rule the only right

(p) *Souden v Souden* (1785) 1 Bro C C 582 *Lechmere v Carlisle* (1817) (1733) 3 P Wms 211 *Hilcock v Hilcock* (1806) 2 Vern 558 *Loche v Hastings* (1689) 2 Vern 97

(q) *Gardner v Townshend* (Marquess) (1815) Coop G 301 and see title EQUITY Vol XIII p 140

(r) *Collins v Plummer* (1709) 1 P Wms 104

(s) *Re Lucan* (Earl) *Hardinge v Cobden* (1890) 45 Ch D 470 and see titles EQUITY Vol XIII pp 97 95 GIFTS Vol XV pp 428 et seq

(t) *Williams v Lucas* (1789) 2 Cox Eq Cas 160 *Berrington v Evans* (1839) 3 Y & C (Ex) 384

(u) *Fremoult v Dedire* (1718) 1 P Wms 429 *Mornington v Keane* (1858) 1 De G & J 292 and see *Re Sankey Brook Coal Co* *Re Radley and Bramall* (1871) L R 12 Eq 472

(v) *Lench v Lench* (1805) 10 Ves 511

(a) See p 2 ante

(b) *Joies v Pearle* (1723) 1 Stra 556 *Ex parte Shank* (1804) 1 Atk 234 *Clark v Gilbert* (1835) 2 Bing (N C) 343 356 *Legg v Evans* (1840) 6 M & W 36 *Thames Iron Works Co v Patent Derrick Co* (1860) 1 John & H 93 *Mulliner v Florence* (1878) 3 Q B D 484 C A, *Bozon v Bolland* (1839) 4 My & Cr 354 *Molesworth v Robbins* (1845) 2 Jo & Lat 358 *Pelly v Wathen* (1851) 1 De G M & G 16 23 C A *Tickbarrow v Masen* (1793) 6 East 21 n H T per BULLER J at p 24 n

# **Sec 1** **Legal Lien**

which it is detained, or otherwise for keeping it (c), and it makes no difference that, by advertisement or otherwise he notifies the owner that such a claim will be made unless the goods are removed and such expenses paid on or before a stated time. Any money paid by the owner under protest in satisfaction of such claim, in order to regain possession of the goods, may be recovered by action (d). It follows therefore that if the holder sells the goods he will be liable to the owner in trover for their value and this principle applies in the case of a solicitor's lien upon his client's papers, though a general lien (e).

## **Exceptions**

There are however certain exceptions as in the tea trade, where it is the custom for the vendors to be paid partly by an immediate deposit while the vendor retains the tea or the warrants which represent it, and on non payment of the balance to sell it and charge the purchaser with any deficiency together with interest and other charges (f).

(c) As to animals see title ANIMALS Vol I p 387 and p 3 ante. As to an innkeeper's liability to feed a guest's horse see title INNS AND INNKEEPERS Vol XVII p 324.

(d) *Somes v British Empire Shipping Co* (1860) 9 H L Cas 339. *Bruce v Ererson* (1883) Cab & L 18. *Dunsdale v London and Brighton Rail Co* (1862) 3 F & R 167 169 n. Lord ELLENBOROUGH C.J. however in *Hartley v Hitchcock* (1816) 1 Strk 408 seems to have thought that a right to sell would arise in such cases where a reasonable time and notice to remove the goods had been given and there are authorities to support such a right in favour of innkeepers prior to the statutory right to sell conferred by the Innkeepers Act 1878 (41 & 42 Vict c 5) s 1 said by some to be confined by custom to London and later and by others to be a general right (see the judgment of PAGE WOOD V.C. in *Thames Iron Works Co v Patent Dredging Co* (1860) 1 John & H 93) to sell a horse to defray the expenses of its keep when on the reasonable appraisement of four neighbours it has been found to have eaten its full value.

(e) *Clark v Gilbert* (1835) 2 Bing (N.C.) 343. As to a solicitor's statutory lien and his right to enforce it see title SOLICITORS.

(f) *Re Tate Ex parte Moffatt* (1841) 2 Mont D & De G 140. There are also certain other exceptions to the general rule where power to sell goods subject to a lien is given by statute e.g. the liens of (1) innkeepers enforceable by sale under the Innkeepers Act 1878 (41 & 42 Vict c 5) s 1 (see title INNS AND INNKEEPERS Vol XVII pp 326 327) (2) carriers enforceable under the Railways Clauses Consolidation Act 1846 (6 & 7 Vict c 20) s 97 and see *Great Western Rail Co v Sharman* (1892) 61 L J (Q.B.) 600 where it was said that a passive lien being an imperfect remedy could not be meant when given by Act of Parliament to be the exclusive remedy. See also as to a carrier's right to sell on non payment *Liehl v Newport Abercromby and Hereford Rail Co* (1866) 3 H & N 409. *North v London and North Western Rail Co* (1863) 9 Jur (N.S.) 897. *Ivens v Great Western Rail Co* (1889) 53 J P 148. *Wallis v London and South Western Rail Co* (1810) L R 5 Exch 62 disapproved in *Caledonian Rail Co v Guild* (1813) 1 R (Ct of Sess.) 198. *Manchester Sheffield and Lincolnshire Rail Co v North Central Wagon Co* (1888) 13 App Cas 254 and as to the obligation of carriers to keep goods for a reasonable time see title CARRIERS Vol IV p 93 (3) shipowners enforceable under Merchant Shipping Act 1894 (57 & 58 Vict c 60) ss 490—501 which extends to a wharfinger's or warehouseman's claim for rent rates and other charges due in respect of any goods deposited by the shipowner with notice that the goods so deposited are subject to a lien and see title SHIPPING AND NAVIGATION. For form of notice to wharfinger to exercise lien for freight and other charges under the Merchant Shipping Act 1894 (57 & 58 Vict c 60), see *Encyclopaedia of Forms and Precedents* Vol IV p 127 (4) vendors of chattels, enforceable under the Sale of Goods Act 1893 (57 & 58 Vict c 71) ss 39, 41, 42 43 and see title SALE OF GOODS (5) dock companies,

All persons entitled to general or particular liens may expressly stipulate for a power of sale and prescribe the terms of sale in the event of the lien remaining unsatisfied after a certain date, there is nothing to prevent parties from attaching such conditions at the time the lien arises (g)

SECT 1  
Legal Lien.

## SECT 2 — *Equitable Lien*

**41** A vendor's lien and other liens upon real estate are enforceable by sale (h) but not until they have been established by a judgment of the court (i) binding the persons affected by the lien (j). An exception to this general rule however exists in the case of trust property, for a lien against a trust estate is not enforceable if the effect of a sale would be to destroy the object of the trust (l). Where a purchaser becomes bankrupt before payment of the purchase money the vendor may nevertheless enforce his lien by a resale, and if the proceeds after payment of the proper expenses be insufficient to discharge the original purchase money he may prove against the bankrupt's estate for the balance (m).

Remedies of unpaid vendor of land

1 resale

The lien of an unpaid vendor also gives him the alternative right to rescind the contract and recover possession of the land (n) but he cannot enforce it by foreclosure (o).

Rescission of contract

**42** The lien may be enforced against land taken by a public company even though the undertaking for which the land was acquired is in active operation and an interest therein has been acquired by the public (p) and it seems that the court may upon the application of a vendor restrain the company from continuing

Against public company

enforceable under the Harbours Docks and Piers Clauses Act 1847 (10 & 11 Vict c 21) s 45 and see *Dresser v Bosanquet* (1862) 4 B & S 400 and title WATERS AND WATERCOURSES

(g) See e.g. the Sale of Goods Act 1893 (56 & 57 Vict c 71) s 48 (4) *Lamond v Davall* (1841) 9 Q B 1050 and title SALE OF GOODS

(h) *Hipe v Birch* (1850) 1 B & Ad 498 *Macbeth v Symmons* (1808) 10 Ves 329 *Westmacott v Robins* (1862) 4 De G F & J 390 396 C A *Snarsten v Clay* (1863) 3 De G J & Sm 558 C A As to enforcement of an equitable lien with interest see *Re Drac Savile v Drac* [1903] 1 Ch 761 C A *Lippard v Ricketts* (1872) L P 14 Eq 291

(i) Actions for the sale and distribution of the proceeds of property subject to any lien are assigned to the Chancery Division by the Judicature Act 1873 (36 & 37 Vict c 66) s 34 (3)

(k) *A G v Sittingbourne and Sheerness Rail Co* (1866) L R 1 Eq 636

(l) *Darke v Williamson* (1858) 20 Beav 622

(m) *Re Perkins Ex parte Mexican Santa Barbara Mining Co* (1890) 24 Q B D 613 C A as to proof by secured creditor see the Bankruptcy Act 1883 (46 & 47 Vict c 52) s 39 Sched II r 9 and title BANKRUPTCY AND INSOLVENCY Vol II pp 224 *et seq* A judgment for specific performance does not create a debt for which there is a vendor's lien within the meaning of this provision (*Re Burr Ex parte Clarke* [1892] W N 138)

(n) *Lysaght v Edwards* (1846) 2 Ch D 499 506

(o) *Manns v Isle of Wight Rail Co* (1870) 5 Ch App 414

(p) *Walker v Ware Hadham and Buntingford Rail Co* (1865) L R 1 Eq 195 *Wang v Tottenham and Hampstead Junction Rail Co* (1868) 3 Ch App 140 *Raper v Crystal Palace and South London Rail Co* (1868) 16 W R 413 *Williams v Great Eastern Rail Co* (1868) 16 W R 821 and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol VI pp 97 *et seq*

## SECT 2

**Equitable  
Lien**West Indian  
estates.

in possession and using the land until the purchase money has been paid (g)

43 Other equitable liens enforceable by sale are those of consignees of West Indian estates (r) and such liens have priority over all other incumbrances, including securities given to the Crown (s)

**Part VII—Extinguishment of Lien****SECT 1—Possessory Lien (a)**Refusal of  
tender

44 A tender by the debtor of the amount due to the creditor puts an end to the creditor's right to retain the goods, but a demand by the creditor for a larger sum than is covered by the lien is not a waiver of his lien (b)

Abandonment  
of lien

Lien is also waived or destroyed where a claim has been abandoned for a number of years (c) or where the party claims to retain goods on grounds different from those on which he rests his claim for lien and makes no mention of lien (d) or where having a lien on goods for general balance, he claims a lien thereon merely for a particular debt (e)

Taking  
security

45 If security be taken for payment at a future date of a debt for which the creditor has a lien upon property of the debtor the lien is in some cases destroyed (f). The mere taking of a security does not necessarily destroy the lien there must be something in the facts of the case or in the nature of the security taken which is inconsistent with and destructive of the lien (g) as for

(g) *Allgood v Menyibent and Darlington Rail Co* (1886) 33 Ch D 571 *Wanchest (Bishop) v Mid Hants Rail Co* (1861) 1 R & Lq 17 see however the following cases to the contrary — *Pell v Northampton and Banbury Junction Rail Co* (1866) 2 Ch App 100 *Munn v Ilchester Light Rail Co* (1860) 5 Ch App 414 *Lutimer v Aylesbury and Buckingham Rail Co* (1815) 9 Ch D 385 *O A Lyett v Stafford and Uttoxeter Rail Co* (1872) 1 R 13 F 1 261

(r) *Fraser v Burgess* (1860) 13 Moo P C C 314 *Bertrand v Davies* (1867) 31 Beav 429 443 *Ietherstone v Mitchell* (1848) 11 I L J R 35 *Tooke v Evans* (1823) 11 I L J R 52 *Hill v Brown* (1844) 6 I L J R 403 *Re Sharp* (1852) 2 Sm & G 518 n and see p 22 ante see also *Re Harriott Ex parte Pengelly* (1863) 9 I L J 854 *Re MacDowall Ex parte Normand Ex parte Graham* (1864) Oust West Indian Incumbered Estates Acts 2nd ed 300 (also reported 8 Sol Jo 851)

(s) *Re MacDowall Ex parte Normand Ex parte Graham supra*

(a) As to possessory liens see pp 2 et seq ante

(b) *Scarfe v Morgan* (1838) 4 M & W 270 *Dicks v Richards* (1842) 4 Man & G 574 see title BAILMENT Vol I p 548

(c) *Re Noble Ex parte Douglas* (1833) 3 Deac & Ch 310

(d) *Boardman v Gull* (1879) 1 Camp 410 n *Heels v Gooder* (1859) 6 C B (n s) 367 *Cannoe v Spanton* (1844) 8 Scott (N R) 714 and see title BAILMENT Vol I p 548 but mere omission to claim the lien when the goods are demanded is not a waiver (*White v Gasner* (1824) 9 Moore (C P) 41)

(e) *Morley v Hay* (1828) 7 I J (C S) (K B) 104

(f) *Cowell v Sampson* (1809) 16 Ves 275 279, *Balch v Symes* (1823) Turn & R 87 *Hewison v Guthrie* (1836) 2 Bing (N O) 755 see also *Horncastle v Farran* (1820) 3 B & Ald 497

(g) *Solarte v Mass Hilbers* (1832) 1 I J (K B) 196 *Mason v Morley* (No 1) (1860) 34 Beav 471, *Angus v MacLachlan* (1853) 23 Ch D 330 *Bank of Africa*

instance, a security taken on property already subject to the lien, or a security which gives time for payment or which gives a right to interest not otherwise payable (*h*) Where bills are given as security the lien may be treated as merely suspended, and may revive on the bills being dishonoured (*i*)

SECT 1  
Possessory  
Lien.

46 Redelivery of goods to the owner (*h*) or his agent, destroys the lien (*l*) and when once made cannot be recalled (*m*), even if made by mistake (*n*) but if such redelivery is induced by fraud the lien revives if possession is recovered even though such recovery is effected by stratagem (*o*) But a lien is not lost by the deposit of chattels with a third party on behalf of the person entitled to the lien or if pursuant to the agreement the owner is allowed the temporary use of the chattel and duly returns it to the third party (*p*)

Loss of  
possession

Where a person having a lien on certain articles improperly sells them he loses his lien and cannot retain the purchase money (*q*)

Improper  
sale

Where there is an agreement between a consignor of goods and a carrier for a general lien such lien is not lost as against the consignor by reason of the refusal of the consignee to accept delivery of the goods (*r*)

Refusal of  
delivery

*v Salisbury Gold Mining Co* [1892] A C 281 P O Thus under the law prior to the Debtors Act 1869 (32 & 33 Vict c 62) when a debtor could be attached such attachment did not deprive a solicitor of his right to a charging order for costs because the two remedies were consistent (*Lloyd v Mason* (1815) 4 Hare 132) nor does a judgment for cost deprive a solicitor of his general retaining lien over documents (*Re Adams Estate* [1894] 1 I R 225) As to waiver of a solicitor's lien see title SOLICITORS

(*h*) *Re Morris* [1908] 1 K B 413 per BUCKLEY L J at p 477

(*i*) *Stevenson v Blalock* (1813) 1 M & S 535

(*k*) *Ex parte Shank* (1854) Atk 234 *Kruger v Wilcox* (1855) Amb 252 (where a factor allowed the owner to sell goods through a broker and informed the broker that the owner would deal with the goods) see also *Hartley v Hitchcock* (1816) 1 Stark 405 (*Castling v Aubert* (1807) 2 East 325 Whether possession has been parted with or not is a question of fact (*Bernal v Iam* (1835) 1 Gale 17) But a captain of a ship who is compelled by law to allow goods to be landed at the Custom House does not lose his lien for freight even though he has parted with possession of the goods (*Wilson v Kymr* (1813) 1 M & S 157)

(*l*) *Sweet v Pym* (1800) 1 East 4 But where a policy had been deposited to secure a loan with a person who on the death of the owner was one of his executors and the insurance office would not pay the policy moneys without the receipt of all the executors the joining of the deposittee executor in such receipt did not put an end to his lien on the policy moneys (*Glaholm v Hountree* (1837) 6 Ad & El 110)

(*m*) *Sweet v Pym supra*

(*n*) *Dicas v Stockley* (1836) 7 C & P 587 see *Bligh v Davies* (1860) 21 Beav 211

(*o*) *Bristol (Earl) v Walsmore* (1823) 1 B & C 514 *Hawse v Crowe* (1826) Ry & M 414 in which cases cheques subsequently dishonoured were fraudulently given to obtain possession of goods which had been sold on terms that they were to be paid for in cash see also *Wallace v Woodgate* (1824) Ry & M 193

(*p*) *Levy v Barnard* (1818) 8 Taunt. 149 *Reeves v Capper* (1838) 5 Bing (N C) 136

(*q*) *Jones v Thurloe* (1823) 8 Mod Rep 172 *Clark v Gilbert* (1835) 2 Bing (N C) 343 *Mulliner v Florence* (1878) 3 Q. B D 484 O A

(*r*) *Westfield v Great Western Rail Co* (1853) 52 L J (Q B) 276.



## SECT 2

Equitable  
LienTaking  
securitySECT 2—*Equitable Lien (s).*

47 A vendor's lien is not, as a rule, lost by the taking of security for the purchase money in the form of a draft promissory note or bill of exchange (t) even though negotiated by the vendor (a) nor by taking as security a mortgage bond (b) or covenant (c) from the purchaser himself, although it would probably be otherwise if the bond or covenant were taken from a third party (d). So in the case of land taken by a public company where the amount of the price and compensation exceeds the deposit paid into the bank the payment of the valuation and the giving of the bond under the Lands Clauses Consolidation Act, 1845 (e) does not destroy the lien (f) nor does the giving of a bond in the case of a contract under which the consideration is to be in cash or, at the option of the company such security as shall be agreed on (g).

On the other hand if the property is sold in consideration of a security (h) or if the contract between the parties or the inference to be clearly drawn from the circumstances, shows an intention that the vendor should rely upon the security only and not upon the property the lien will be lost (i).

Loss of lien  
depends on  
intention.

But in all such cases the question whether the lien is lost depends on the intention of the parties as a fact ascertained from the circumstances of the particular case (h). Thus where the parties agree to postpone payment of the purchase money until a

(s) As to equitable liens see pp 14 *et seq* *ante*

(t) *Hughes v Karney* (1803) 1 Sch & Lef 132 *Grant v Mills* (1813) 2 Ves & B 306 *Gulbons v Baddall* (undated) 2 Fq Cas Abr 3rd ed 652 *le Lightoller Ex parte Peake* (1816) 1 Madd 346 *Gunn v Boklow Vaughan & Co* (1875) 10 Ch App 491 see also *Re Defries (J) & Sons Ltd Lührl v Defries (J) & Sons Ltd* [1909] 2 Ch 425 *Henderson v Arthur* [1907] 1 K B 10 13 C A

(a) *Re Wright Ex parte Loaring* (1914) 2 Rose 79 *Re Defries (J) & Sons Ltd Fichholz v Defries (J) & Sons Ltd supra*

(b) *Collins v Collins* (No 2) *Downes v Downes* (1869) 31 Beav 346

(c) *Tardiff v Scughan* (1869) cited 1 Bro C C 423 *Ilott v Edwards* (1802) 3 Bos & P 181 *Nairn v Irons* (1802) 6 Ves 752 *Maulith v Symmons* (1808) 15 Ves 329 *Hipe v Booth* (1850) 1 B & Ad 498 see however *Fovel v Heelis* (1773) 1 Bro C C 421

(d) *Cood v Cood and Pollard* (1872) 10 Price 109 Ex Ch

(e) 8 & 9 Vict c 13 s 85 see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 99 *et seq*

(f) *Walker v Ware Hadham and Buntingford Rail Co* (1865) L R 1 Eq 195

(g) *Pell v Midland and South Wales Rail Co* (1869) 17 W R 506

(h) *Winter v Anson (Lord)* (1928) 3 Russ 488 *Clarke v Royle* (1830) 3 Sim 499 *Buckland v Pocknell* (1843) 13 Sim 406

(i) *Parrott v Sweetland* (1835) 3 My & K 655 *Winter v Anson (Lord) supra* at p 492 *Re Albert Life Assurance Co Ex parte Western Life Assurance Society* (1870) L R 11 Eq 161 *Re Brentwood Brick and Coal Co* (1876) 4 Ch D 562 C A *Re London and Lancashire Paper Mills Co* (1888) 58 L R 798 *Gore and Durant's Case* (1866) L R 2 Eq 349 was distinguished on the ground that though payment was to be made as in *Re Brentwood Brick and Coal Co supra*, out of moneys arising out of certain sources which never became available the agreement was to be void on non payment within a fixed time compare *Re Durrrow Brick and Tile Works Co* [1901] 1 L R 530 C A

(k) Compare *Re Taylor, Stileman and Underwood*, [1891] 1 Ch 590 C A.

resale (l), or the vendor takes a bond and a mortgage of part of the property sold (m), or where the consideration is an annual rent payable by a railway company (n), or the payment of an annuity for two or more lives secured by the bond of the purchaser (o), or where the vendor concurs in a mortgage by the purchaser of the property to a person who lends part of the purchase money (a), or where the vendor takes a mortgage for part of the purchase money, and a promissory note payable on demand for the remainder (b) in each of these cases the lien is lost. It also seems that the lien is destroyed if the bond or covenant instead of being given by the purchaser alone, is joined in by sureties (c). The result is the same if the vendor takes from the purchaser, as special security for the purchase money a sum of stock (d) or probably a mortgage upon another estate of the purchaser (e), although such a mortgage is not conclusive evidence of an intention to give up the lien (f).

The principle derived from the authorities appears to be that the taking of a distinct security affords evidence that the lien has been abandoned but that this inference may be rebutted by proof of an agreement to the contrary moreover it appears to be settled that both vendor and purchaser lose their liens if by their own act or default the contract is not completed (g).

48 The lien of a vendor will also be lost if in Yorkshire he fails to register a memorandum thereof in accordance with the Yorkshire Registries Act 1884 (h). In the case of land in a district where compulsory registration is in force under the Land Transfer Acts 1875 and 1897 (i) the vendor's lien must be registered to protect it unless the land is being registered for the first time with a possessory title only (j).

 Registered  
 land

(l) *Re Parkes Ex parte Parkes* (1823) 1 Gt & J 228

(m) *Capper v Spottiswoode* (1829) 11 Mtl 21

(n) *Jer ey (Part) v Bilton Terr; Loading Dock Co* (1869) L R 7 Tq 409, and see *Winter v Ans n (Lord)* (1825) 3 L R 488

(o) *Dixon v Gayfer* (No 3) (1855) 21 L R 118

(a) *Cood v Cood and Illard* (1871) 9 L R 544

(b) *Bond v Kent* (1692) 2 Vern 261

(c) *Cood v Cood and Pollard* (1822) 10 P R 109 1x Ch

(d) *Nairn v Irowse* (1802) 6 Ves 752

(e) *Ibid*

(f) *Muckreth v Symmons* (1808) 10 Ves 329 per Lord Eldon LC at p 348, see p 28 ante

(g) *Oxenham v Esdaile* (1878) 2 Y & J 493 *Esdaile v Oxenham* (1824) 3 B & C 275 *Dunn v Grant* (1852) 3 D G & Sm 401 *Redout v Iouler* [1904] 1 Ch 608. For an instance where a lien is preserved as to part and lost as to the remainder see *Mudreth v Symmons supra* see also *Re Ryland Ex parte Ladd Ex parte Mole* (1834) 3 Deac & Ch 641 (tenant rejecting lease after expenditure on property) and *Re Darrow Brick and Tile Works Co* [1904] 1 I R 530 C A (vendor's lien lost by placing third parties in false position)

(h) 47 & 48 Vict c 54 s 7. Non registration under the Middlesex Registry Act 1708 (7 Ann c 20) does not avoid interests in land not created in writing (*Sumpter v Cooper* (1831) 2 B & Ad 223 *Re Stephens Estate* (1810) 10 L R Eq 282 *Re Burke's Estate Ex parte Burke* (1881) 9 L R Ir 24, C A *Kettlewell v Watson* (1884) 26 Ch D 501)

(i) 38 & 39 Vict c 81, 60 & 61 Vict c 65

(j) See Land Transfer Act 1810 (38 & 39 Vict. c 87) s 32, Land Transfer

Sec 2  
**Equitable  
 Lien**  
 Partnership  
 Lien

**49** A partnership lien is lost if by agreement the assets of the partnership are distributed among the partners so as to become their separate property (*l*), unless the distribution is made expressly subject to the lien (*m*)

Rules 1903 r 142 and generally title REAL PROPERTY AND CHATELS  
 REAL

(*l*) *Jungen v Simpson* (1824) 1 Sim & St 600 *Holroyd v Griffiths* (1516)  
 3 Drew 428 and see *Ex parte Ruffin* (1501) 6 Ves 119 *Re Haywood's*  
*part Bundekin* (1842) 2 Mont D & Do G 704 As to partnership lien see  
 p 18 *note*  
 (*m*) *Holderness v Shale's* (1525) 9 B & C 612

## LIFE INSURANCE

*See* INSURANCE

## LIFE-BOATS

*See* SHIPPING AND NAVIGATION

## LIFE-SAVING APPLIANCES

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION SHIPPING AND  
 NAVIGATION

## LIGHT

*See* FASSEMBENTS AND LIGHTS A PLENDER

## LIGHT COIN

*See* CONSTITUTIONAL LAW CRIMINAL LAW AND PROCEDURE

## LIGHT RAILWAYS

*See* TRAMWAYS AND LIGHT RAILWAYS

## LIGHTHOUSES

*See* SHIPPING AND NAVIGATION

# LIMITATION OF ACTIONS

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| <i>Constructive Trusts</i>       | , | EQUITY, TRUSTS AND TRUSTEES                   |

| <i>For Copyholds</i>                 | <i>See title</i> | <b>COPYHOLDS</b>   |
|--------------------------------------|------------------|--|
| <i>Costs</i>                         |                  | SOLICITORS   |
| <i>Coverture</i>                     |                  | HUSBAND AND WIFE   |
| <i>Criminal Law</i>                  |                  | CRIMINAL LAW AND PROCEDURE   |
| <i>Curtsey</i>                       |                  | HUSBAND AND WIFE REAL PROPERTY AND CHATELS REAL  |
| <i>Days of Grace</i>                 |                  | BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS TIME   |
| <i>Declarations against Interest</i> |                  | EVIDENCE   |
| <i>Delay</i>                         |                  | EQUITY   |
| <i>Easements</i>                     |                  | EASEMENTS AND PROFITS A PRENDRE  |
| <i>Ecclesiastical Law</i>            |                  | ECCLIASTICAL LAW   |
| <i>Equitable Doctrines</i>           |                  | EQUITY   |
| <i>Evidence</i>                      |                  | EVIDENCE   |
| <i>Execution</i>                     |                  | EXECUTION  |
| <i>Executors -</i>                   |                  | EXECUTORS AND ADMINISTRATORS   |
| <i>Express Trusts</i>                |                  | SETTLEMENTS TRUSTS AND TRUSTEES  |
| <i>Extraordinary Traffic</i>         |                  | HIGHWAYS STREETS AND BRIDGES   |
| <i>Family Arrangements</i>           |                  | FAMILY ARRANGEMENTS  |
| <i>Forfeiture</i>                    |                  | COPYHOLDS CRIMINAL LAW AND PROCEDURE   |
| <i>Fraudulent Conveyances</i>        |                  | BANKRUPTCY AND INSOLVENCY FRAUDULENT AND VOIDABLE CONVEYANCES LANDLORD AND TENANT DECEIT AND DISTRIBUTION REAL PROPERTY AND CHATELS REAL |
| <i>Freehold</i>                      |                  | COPYHOLDS  |
| <i>Heriots</i>                       |                  | HIGHWAYS STREETS AND BRIDGES   |
| <i>Highways</i>                      |                  | HUSBAND AND WIFE   |
| <i>Husband and Wife</i>              |                  | INFANTS AND CHILDREN   |
| <i>Infancy</i>                       |                  | CRIMINAL LAW AND PROCEDURE   |
| <i>Information</i>                   |                  | CROWN PRACICE  |
| <i>Lapse</i>                         |                  | ECCLIASTICAL LAW   |
| <i>Lease</i>                         |                  | LANDLORD AND TENANT  |
| <i>Libel and Slander</i>             |                  | LIBEL AND SLANDER  |
| <i>Lunacy</i>                        |                  | LUNATICS AND PERSONS OF UNSOUND MIND   |
| <i>Married Women</i>                 |                  | HUSBAND AND WIFE   |
| <i>Master and Servant</i>            |                  | MASTER AND SERVANT   |
| <i>Mortgage</i>                      |                  | MORTGAGE   |
| <i>Pleading</i>                      |                  | PLEADING   |
| <i>Practice and Procedure</i>        |                  | PRACTICE AND PROCEDURE   |
| <i>Prescription</i>                  |                  | EASEMENTS AND PROFITS A PRENDRE  |
| <i>Presentation Right of</i>         |                  | ECCLIASTICAL LAW   |
| <i>Profits a Prendre</i>             |                  | EASEMENTS AND PROFITS A PRENDRE  |
| <i>Proof of Debt</i>                 |                  | BANKRUPTCY AND INSOLVENCY EXECUTORS AND ADMINISTRATORS   |
| <i>Public Authorities Protection</i> |                  | PUBLIC AUTHORITIES AND PUBLIC OFFICERS   |
| <i>Retainer</i>                      |                  | EXECUTORS AND ADMINISTRATORS   |
| <i>Seamen's Wages</i>                |                  | SHIPPING AND NAVIGATION  |
| <i>Settlements</i>                   |                  | SETTLEMENTS  |
| <i>Shipping and Navigation</i>       |                  | SHIPPING AND NAVIGATION  |
| <i>Solicitors -</i>                  |                  | SOLICITORS   |
| <i>Summary Proceedings</i>           |                  | MAGISTRATES  |
| <i>Tenancy -</i>                     |                  | LANDLORD AND TENANT  |
| <i>Trusts</i>                        |                  | EQUITY SETTLEMENTS TRUSTS AND TRUSTEES   |
| <i>Voidable Conveyances</i>          |                  | FRAUDULENT AND VOIDABLE CONVEYANCES  |
| <i>Waste - -</i>                     |                  | LANDLORD AND TENANT SETTLEMENTS  |
| <i>Winding up - -</i>                |                  | COMPANIES PARTNERSHIP  |

## Part I—Introduction

### PART I Introduction

**50** For most actions there are prescribed by statute periods of limitation within which proceedings must be commenced to prevent the statutory bar

Nature of  
Statutes of  
Limitation

The statutes which impose periods of limitation for classes of actions are called Statutes of Limitation (*a*). Their provisions vary according to their subject matter but they are all *in pari materia* and should receive a uniform construction they are beneficial statutes and are to be construed liberally and not strictly (*b*).

Construction

All Statutes of Limitation except those which govern rights to real property (*c*) are rules of procedure only and form part of the *lex fori*. Therefore if an action is brought in England the period of limitation wherever the cause of action arose, is governed by the appropriate Statute of Limitation (*d*).

## Part II—Simple Contract Debts and Personal Actions

### SECT. 1—Periods of Limitation

**51** The period of limitation for most actions of tort and for actions arising out of simple contract is six years from the accrual of the cause of action (*e*).

Actions of  
tort and  
simple  
contract

(*a*) *Gregory v Torquay Corporation* [1911] 2 K B 556. The Statutes of Limitation are for actions on simple contract and torts (see the text *infra*) the Limitation Act 1623 (21 Jac 1 c 16) amended by stat (1705) 4 & 6 Ann c 3 the Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) and the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 91) for actions on specialty debts etc (see p 76 *post*) the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) for actions to recover land and money charged on land (see p 82) the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 27) 1837 (1 Will 4 & 1 Vict c 28) and 1874 (37 & 38 Vict c 57) and the Law of Property Amendment Act 1860 (23 & 24 Vict c 36) in the case of Crown property (see p 159 *post*) the Crown Suits Acts 1769 (9 Geo 3 c 16) and 1861 (24 & 25 Vict c 62) in the case of the property of the Duchy of Cornwall (see p 161 *post*) stat (1844) 7 & 8 Vict c 105 (1860) 23 & 24 Vict c 33 for penal actions (see p 174 *post*) stat (1588) 9 31 Eliz c 5 and the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) for actions against trustees (see p 161 *post*) the Trustee Act 1888 (51 & 52 Vict c 59) for actions against public authorities (see p 176 *post*) title PUBLIC AUTHORITIES AND PUBLIC OFFICERS the Public Authorities Protection Act 1893 (56 & 57 Vict c 61). Besides these general statutes there are special statutes fixing special periods of limitations in particular cases (see p 177 *post*). As to the effect of the Judicature Acts upon the Statutes of Limitation see title ACTION Vol I pp 46 47.

(*b*) *Murray v East India Co* (1821) 5 B & Ald 204 215. *Doe d Duroure v Jones* (1791) 4 Term Rep 300 308. *Tolson v Kaye* (1822) 3 Brod & Bing 217 227. *A Court v Cross* (1825) 3 Bing 329 332. *Hunter v Gibbons* (1856) 1 H & N 459. *King v Walker* (1761) 1 Wm Bl 286. *Lafond v Ruddock* (1853) 13 O B 813 820. *Scales v Jacob* (1826) 3 Bing 638 645. *Perry v Jackson* (1792) 4 Term Rep 516 519.

(*c*) See *Dundas Harbour (Trustees) v Dougall* (1852) 1 Macq 317 321 H L.

(*d*) *Lafond v Ruddock supra per JERVIS OJ* at p 818. *Bury v Goldner* (1844) 1 Dow & L 834. *Finch v Finch* (1876) 45 L J (CH) 816 and see title CONFLICT OF LAWS Vol VI pp 246—248 302 306 *et seq*.

(*e*) Limitation Act 1623 (21 Jac 1 c 16) s. 3. Mercantile Law Amendment



## SECT 1

## Periods of Limitation

Actions on awards, for copyhold fines escape and *fiere facias*

Trespass to the person  
Slander

Libel

**52** For actions of debt upon an award when the submission is not by specialty (*f*), or for any fine due in respect of copyhold estates (*g*) or for an escape (*h*) or for money levied on a *fiere facias* (*i*) the period of limitation is six years from the accrual of the cause of action (*j*)

**53** For actions of trespass to the person (*k*) the period of limitation is four years after the accrual of the cause of action (*l*)

**54** For actions of slander when the words are actionable *per se*, the period of limitation is two years from the speaking of the words (*m*), but if the words are not actionable *per se*, then six years from the happening of the damage (*n*)

An action of libel must be brought within six years from publication (*o*)

## SECT 2—Actions to which the Limitation Act, 1623 applies

## SUB SECT 1—Actions within the Act

General application

**55** The Limitation Act, 1623 (*p*) (frequently referred to in this part of this title as the Act of 1623) applies to all actions arising out of simple contracts and to all actions of tort at common law (*q*)

Act 1556 (19 & 20 Vict c 94) s 9. As to the meaning of the term simple contract see title CONTRACT Vol VIII p 331. As to what actions are within the Act see the text *infra*. Actions of accounts relating to trade between merchant and merchant were excluded from the Limitation Act 1623 (21 Jac 1 c 16) see *Holmes v Alexander* (154) 2 Cl & Fin 71, 11 1 but the limitation of six years was applied to them by the Merchant Law Amendment Act 1556 (13 & 20 Vict c 14) s 3 see *Friend v Young* [1891] 2 Ch 421 431

(*f*) *Turner v Midland Rail Co* [1911] 1 K 1 852 see *Hodsdon v Harridge* (1669) 2 Wms Saund (ed 1841) 150

(*g*) Civil Procedure Act 1533 (3 & 4 Will 4 c 42) s 3 see *Monckton v Iayne* [1899] 2 Q B 603 *Traver v Masor* (1883) 11 Q B D 574 C 4

(*h*) As to escape see title CRIMINAL LAW AND PROCEDURE Vol IX pp 508 *et seq*

(*i*) Civil Procedure Act 1533 (3 & 4 Will 4 c 42) s 3 see title EXECUTION Vol XIV pp 37 *et seq*

(*l*) *I.e.* assault and false imprisonment see title TRESPASS see also title CRIMINAL LAW AND PROCEDURE Vol IX pp 296 *et seq*

(*j*) Limitation Act 1623 (21 Jac 1 c 16) s 3

(*m*) *Ibid* As to words actionable *per se* see title LIBEL AND SLANDER Vol XVIII pp 606 *et seq*

(*n*) *Saunders v Edwards* (1662) 1 Sid 90 *Jau v Harwood* (1628) Cro Car 140 *Topsall v Edwards* (1629) Cro Car 163 *Broune v Gibbons* (1703) 1 Salk 206 see *Fittibury v Wright* (1662) 1 Sid 90 *Backhouse v Bonoma* (1861) 9 H L Cas 503 *per Lord CRANWORTH* at pp 512 513 compare *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 *or* an action of slander of title the period of limitation is six years (*Law v Harwood supra*)

(*o*) *Say and Seal (Viscount) v Stephens* (1628) Cro Car 530

(*p*) 21 Jac 1 c 16 s 3

(*q*) The Limitation Act 1623 (21 Jac 1 c 16) was limited to actions at common law but is now applicable to actions in any division of the High Court (see p 169 *post*) as to its application formerly in equity see note (*l*) *ibid*. The Act of 1623 mentions certain particular forms of action namely all actions of trespass *quare clausum fregit* all actions of trespass detinue trover and replevin for taking away of goods and cattle of account and upon the case, other than accounts between merchant and merchant their factors and servants of debt grounded upon any lending on contract without specialty, of debt for arrears of rents (as to which see note (*s*) p 40 *post*) and all actions of assault menace battery wounding, or imprisonment *Assumpsit* (action founded on contract other than an action of debt) is not specifically mentioned but was held to be

except those actions for which there is a special period of limitation provided (r)

SECT 2  
Actions to  
which the  
Limitation  
Act 1623  
applies

Particular  
instances  
of simple  
contract  
debts

**56** The Limitation Act, 1623 (s), also applies to the personal remedy on a simple contract debt which is charged on land, where there is no covenant to pay (t), to a simple contract debt which is recited in a deed unless there is in the deed an express or implied contract to pay it (u) to a warrant of attorney to confess judgment for the amount of a simple contract debt (x), to an action for mesne profits (y) to an action against the equitable assignee of leaseholds in possession grounded on his liability to perform the covenants in the lease (a) to a set off or counterclaim (b) to an action founded on a foreign judgment (c) and to an Admiralty action for seamen's wages (d)

**57** An action which a statute expressly enables to be brought but which is not an action for a statutory debt is within (c) the Act of 1623 (f) Thus an action against a director of a company under the Companies (Consolidation) Act 1908 (g) s 84 (h) and the action referred to in the Copyhold Act 1894 s 26 (i) are it seems

Actions  
divided  
statute

within the statute see (*handler v Vilett* (1670) 2 Wms Saund (ed 1811) 391 As to trover see *Suayn v Stephens* (1602) Cro Car 245 title TROVER AND DETINUE As to merchants accounts see note (e) pp 31, 34 ante Terms of action are now abolished (see title ACTION Vol I p 40) but the Limitation Act 1623 (21 Jac 1 c 16) still applies to the circumstances which constituted the actions named in it although the actions are no longer called by the same names see (*ibbs v Guild* (1887) 9 Q B D 59 67 C A

(r) See p 116 post

(s) Limitation Act 1623 (21 Jac 1 c 16) s 3

(t) *Luth v Slingsby* (1855) 55 I 1 481 *Larnes v Glenton* [1839] 1 Q B 885 C A

(u) *Iten v Elwes* (1804) 3 Drew 23

(x) *Clarke v Hayes* (1811) 2 Stark 334 see title JUDGMENTS AND ORDERS Vol XVIII p 190

(y) Buller Law of Nisi Prius 88 Adams Action of Ejectment 4th ed 393 *Reade v Reade* (1801) 5 Ves 144

(a) *Sanders v Benson* (1841) 4 Beav 550

(b) Statute of Frauds Amendment Act 1623 (9 Geo 1 c 14) s 1 P S C Ord 19 r 3 *Iemington v Stevens* (1818) 2 Stia 1211 *Rawley v Rawley* (1876) 1 Q B D 460 C A see *Dingle v Cogan* (1899) 1 Ch 726 *Smith v Betty* [1903] 2 K B 317 323 C A See as to pleading and practice in case of set off p 184 post title SET OFF AND COUNTERCLAIM

(c) *Dupleix v De Loven* (1806) 2 Vern 540 see *Wilson v Dunsany (Lady)* (1804) 15 Beav 293 disapproved on another point *Pe Klocke Hannreuther v Gesselbrecht* (1884) 28 Ch D 110 *Iemmers v Druce* (1857) 23 Beav 145 and see title JUDGMENTS AND ORDERS Vol XVIII p 219 As to an action on an English judgment see p 80 post

(d) Stat (1805) 4 & 5 Ann c 3 s 17 see title SHIPPING AND NAVIGATION

(e) *Cork and Bandon Rail Co v Goode* (1853) 13 C B 826 per MAULE J at p 830 see also *Salford County Borough Corporation v Lancashire County Council* (1890) 25 Q B D 384 C A (expenses of local authority) *Re Newbigin's Estate Eggleton v Newbigin* (1887) 36 Ch D 417 *Re Watson Stamford Unson v Barlett* [1899] 1 Ch 72 *Re Clabbon an Infant* [1904] 2 Ch 461 (maintenance of pauper lunatic) *Tobacco Pipe Makers Co v Loder* (1851) 16 Q B 765 (penalty under bye law of chartered company) An action for a statutory debt is an action on a specialty, as to which see p 16 post

(f) Limitation Act 1623 (21 Jac 1 c 16)

(g) 8 Edw 7 c 69

(h) *Thomson v Clamorris (Lord)* [1900] 1 Ch 718 C A, see also title COMPANIES Vol V p 136 et seq

(i) 57 & 58 Vict c 46 see title COPYHOLDS Vol VIII p 122

**SECT 2**  
**Actions to**  
**which the**  
**Limitation**  
**Act, 1623**  
**applies**

*Devastant*  
and claims  
against estate  
of deceased

*I and*  
Rentcharges  
etc

Specialty

Equitable  
claims

Actions *in*  
*rem*

within the Act of 1623 (*j*) as is also a claim for an indemnity under the Land Transfer Act, 1897, s 26 (*k*)

**58** The Act of 1623 (*l*) applies to a claim against an executor personally founded on a *devastant* (*m*) and to proceedings to enforce the statutory right which simple contract creditors have (*n*) against the real estate of their deceased debtors (*o*)

**SUB SECT 2 — Actions not within the Act**

**59** The Limitation Act 1623 (*p*) does not apply to an action for the recovery of land (*q*) or for a rentcharge or arrears of a rentcharge (*r*) or for rent reserved on an indenture of demise (*s*), nor does it apply to an action brought on a statute for a statutory debt (*t*) or on a record (*a*), or other specialty (*b*)

**60** Except in cases which come within the Mercantile Law Amendment Act 1856 (*c*) or the Trustee Act 1898 (*d*) the Act of 1623 (*e*) does not apply to a purely equitable right for which there was no analogous remedy at common law (*f*)

An action *in rem* for damages to a ship by collision is not within

(*j*) Limitation Act 1623 (21 Jac 1 c 16)

(*k*) 60 & 61 Vict c 60 s 7 (*l*) See pp 41 46 *post*

(*l*) Limitation Act 1623 (21 Jac 1 c 16) s 3

(*m*) See *Re Croydon* (1908) 120 L J 262 and the cases cited in title EXECUTORS AND ADMINISTRATORS Vol XIV p 31, note (*a*) and see generally *ibid* pp 317 318 compare *ibid* p 265 At common law the remedy for a *devastant* was an action of trespass see *Thorne v Kerr* (1850) 2 K & J 64 63 As to the effect of the Trustee Act 1888 (51 & 52 Vict c 69) s 8 see also pp 161 162 *post*

(*n*) See title EXECUTORS AND ADMINISTRATORS Vol XIV p 246

(*o*) *Lordham v Wallis* (1833) 10 Hare 217 As to marshalling of assets before the Administration of Estates Act 1833 (3 & 4 Will 4 c 100) see *Lordham v Wallis supra* If a testator by his will charges his real estate with his simple contract debts then the period of limitation is twelve years see p 82 *post* title EXECUTORS AND ADMINISTRATORS Vol XIV p 254

(*p*) 21 Jac 1 c 16 s 3

(*q*) See p 101 *post*

(*r*) Limitation Act 1623 (21 Jac 1 c 16) s 3 See Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 p 76 *post* *Freeman v Stacy* (1629) Hut 109 *Stackhouse v Barnston* (1805) 10 Ves 403 467 *Cupit v Jackson* (1824) M Cle 495 *Collins v Goodall* (1691) 2 Vern 235

(*s*) *Freeman v Stacy supra* The words in the Act actions of debt for arrearages of rent are limited to arrears of rent where the demise is with out deed (*ibid*) As to arrears of rent where the demise is by deed see p 77, *post*

(*t*) *Talory v Jackson* (1638) Cro Car 513 *Cork and Bandon Rail Co v Goode* (1853) 13 C B 826 *Shepherd v Hells* (1850) 11 Exch 55 *Nichols v Regent's Canal Co* (1894) 71 L T 249 *per* CHARLES J at p 254 (reversed on another point 71 L T 836 C A.) *Re Cornwall Minerals Rail Co* [1897] 2 Ch 74 *Magherafelt Union v Gibben* (1889) 24 L R Ir 520 *Hampstead Corporation v Caunt* [1903] 2 K B 1 see p 39 *ante*

(*a*) *Jones v Pope* (1666) 1 Wms Saund (ed 1871) 55 Therefore an action on an English judgment is not within the statute see p 85 *post* As to an action on a foreign judgment see p 39 *ante*

(*b*) *Jones v Pope, supra*. As to what debts are specialty debts and as to the period of limitation for such debts see p 78 *post*

(*c*) 19 & 20 Vict c 97 s 9 see note (*e*) p 37, *ante*

(*d*) 51 & 52 Vict c 69 see p 161 *post*

(*e*) Limitation Act, 1623 (21 Jac 1, c. 16)

(*f*) See pp. 169, 170 *post*

the Limitation Act 1623 (g) nor is a penal action (h) nor an action claiming a mandamus (i)

SECT 2  
Actions to  
which the  
Limitation  
Act 1623  
applies

61 The Act of 1623 (j) does not in general apply to proceedings by and against the Crown (k) but it has been made applicable to the claim of a person to indemnity from the Crown under the Land Transfer Act 1897 (l)

Mandamus  
The Crown

If a debt which is not statute barred is vested in the Crown the statute ceases to run during the time it is vested in the Crown (m) But a debt which is already statute barred will not be revived by being vested in the Crown and the statute may be pleaded in answer to a claim by the Crown in respect of such a debt (n)

### SECT 3—*The Remedy Barred, not the Right*

62 The Limitation Act 1623 (o) only takes away the remedy by action or by set off (p) it leaves the right otherwise untouched (q) and if a creditor whose debt is statute barred has any means of enforcing his claim other than by action or set off (p) the Act does not prevent him from recovering by such means (r)

The statute  
takes away  
the remedy  
only

Thus money paid to a creditor by the debtor without appropriation may be appropriated to the statute barred debt (s) though the creditor

Appropriation  
of payments

(g) *The Kong Magnus* [1891] P 273 compare *The Longford* (1889) 14 P D 34 C A *The Irons* [1901] P 131 C A

(h) See p 174 post

(i) *Ward v Lowndes* (1859) 1 E & E 940 956 and see title CROWN PRACTICE Vol X p 106 But as the granting of a mandamus is to a certain extent a matter of discretion the court may refuse to grant a mandamus the object of which is to secure the payment of a statute barred debt see *Hart v Lowndes* (1859) 1 E & D 940 956 *Ringland v Lowndes* (1863) 13 C J (N S) 173 per BYLES J at p 199 reversed on another point (1864) 17 C B (N S) 514 Ex Ch *Salford County Borough Corporation v Lancashire County Council* (1890) 25 Q B D 384 C A There is no Statute of Limitations applicable generally to an action for a mandamus but as to a mandamus to enforce judgment against guardians of the poor see p 180 post As to the prerogative writ of mandamus see title CROWN PRACTICE Vol X pp 111 et seq

(j) Limitation Act 1623 (21 Jac 1 c 16)

(k) The Crown not being mentioned therein see *Rustomjee v R* (1861) 1 Q B D 487 *Lambert v Taylor* (1825) 1 B & C 138 *Trummell v M'Pherson* (1828) 5 Russ 263 As to the Statutes of Limitation affecting the Crown see p 159 post

(l) 60 & 61 Vict c 60 s 7 (7) see p 46 post and title REAL PROPERTY AND CHATTELS REAL

(m) *Lambert v Taylor supra* If the debt after being vested in the Crown again becomes vested in a subject the statute it seems runs from the time when it so became vested in the subject (*ibid*)

(n) *R v Morrall* (1818) 6 Price 24

(o) 21 Jac 1 c 16 s 3

(p) See note (b) p 39 ante

(q) Statute barred debts are due though payment of them cannot be enforced by action (*Curwen v Milburn* (1889) 42 Ch D 424 C A per COTTON L J at p 434) As to the effect of the Statutes of Limitation in bankruptcy see title BANKRUPTCY AND INSOLVENCY Vol II pp 41 91 202

(r) *Wainford v Barker* (1697) 1 Ld Raym 232 *Courtenay v Williams* (1844) 3 Hare 539 551 *Poole v Poole* (1871) 7 Ch App 1 *Re Milnes Milnes v Sherwin* (1885) 53 L T 534 So a creditor who has in his hands securities belonging to a surety is entitled to hold them although time has run against the principal debtor (*Carter v White* (1883) 25 Ch D 666 and see title GUARANTEE Vol XV pp 561 et seq)

(s) See title CONTRACT Vol VII p 451 and p 69 post

**SECT 3**  
**The**  
**Remedy**  
**Barred not**  
**the Right**

Securities  
may be  
enforced.

Trustees  
indemnity as  
to costs

Claims  
against  
solicitors

cannot so appropriate money received on behalf of but without the knowledge of the debtor (t)

If a creditor has a lien or other security for his debt he may enforce his lien or security after the debt is barred (a) Thus the lien of a solicitor on documents in his hands for a statute barred debt is not affected (b) by the Act of 1623 (c) though no order can be made under the Solicitors Act, 1860 (d) making solicitors costs in an action a charge on the property recovered or preserved, if the right to recover payment of such costs is barred (e)

The right which trustees have to be indemnified out of the trust estate extends to all solicitors costs properly incurred by trustees whether those costs are statute barred or not if trustees have paid or are willing to pay such costs (f)

If a solicitor improperly detains money due to a client the Act of 1623 (c) is no bar to the recovery of the money by means of the summary jurisdiction of the High Court (g)

**SECT 4 — When Time begins to Run**

**SUB SECT 1 — In General**

Accrual of  
cause of  
action

**63** The period of limitation under the Limitation Act 1623 (h) begins when the cause of action accrues A cause of action accrues, when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed (i)

**SUB SECT 2 — In Actions Founded on Contract**

Breach of  
contract

**64** In an action for a breach of contract the cause of action is the breach (j) Accordingly such an action must be brought within

(t) *Haller v Jacy* (1840) 1 Man. & G. 34

(a) *Spears v Hartly* (1800) 3 Esp. 81 *Richards v Curlews* (1854) 3 Eq. Rep. 278 *Higgins v Scott* (1831) 2 L. & Ad. 413 *Re Broomhead* (1847) 5 Dow. & L. 52 *London and Midland Bank v Mitchell* [1899] 2 Ch. 161 compare *Re Hepburn Ex parte Smith* (1884) 14 Q. B. D. 394 399 and see the cases dealing with the executor's right of retainer of a statute barred debt cited in title EXECUTORS AND ADMINISTRATORS Vol. XIV p. 258 and in *Re Low Bland v Low* [1894] 1 Ch. 147 C. A. and see the cases as to the acknowledgment or part payment of a statute barred debt cited on pp. 58 59 61 post and see also title LIEN p. 3 ante

(b) *Higgins v Scott* (1831) *supra* *Re Murray* [1861] W. N. 140 *Re Carter's Estate Carter v Carter* [1885] W. N. 184

(c) Limitation Act 1623 (21 Jac. 1 c. 16) s. 3

(d) 23 & 24 Vict. c. 12

(e) *Ibid* s. 28 see further title SOLICITORS

(f) *Budgett v Pudgett* [1895] 1 Ch. 202 As to the taxation of statute barred items in a solicitor's bill see *J. Ince v Ince* [1909] 2 Ch. 100 C. A. *Curwen v Milburn* (1889) 42 Ch. D. 474 C. A. and title SOLICITORS

(g) *Ex parte Sharpe* (1831) 5 Dow. 117, compare *Ex parte Eatman* (1830) 4 Dow. 304 *Sittingbourne and Sheerness Rail Co v Dawson* [1886] W. N. 76

(h) Limitation Act 1623 (21 Jac. 1 c. 16) s. 3 The rules governing its running of time are the same under the Civil Procedure Act, 1833 (3 & 4 Will. 4 c. 42) As to disabilities see p. 56 post

(i) *Cooke v Gell* (1873) L. R. 8 C. P. 107 per BRETT J. at p. 116 *Read v Brown* (1888) 22 Q. B. D. 128 C. A. *Coburn v Colledge* [1897] 1 Q. B. 702 C. A. title ACTION Vol. I, p. 6 As to non existence of plaintiff or defendant see p. 63 post

(j) *Gould v Johnson* (170) 2 Salk. 422 *East India Co v Oditchurn Paul* (1849) 7 Moo. P. C. C. 85

six years of the breach after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought (l) In such an action it is not necessary to prove actual damage and special damage is merely alleged as a measure of the damages to be recovered (m) The time is not extended by the fact that the breach has not been discovered or that damage has not resulted until after the expiration of six years (n)

SECT 4  
When Time  
begins to  
Run

**65** If the contract is to do something at a particular time or upon the happening of a contingency and the thing contracted for is not done the cause of action arises at the time specified or upon the contingency happening (o)

Contract in  
respect of a  
contingency

If the promise is to do anything upon request other than the payment of a present debt time runs from the request (p) In the case of a promise to pay a present debt on demand, no demand is necessary, and the cause of action arises on the promise (q)

Promise to  
pay on  
demand

**66** In an action for money lent if a time is specified for repayment, or any condition for repayment other than mere demand is imposed the statute runs on the expiration of the time specified or on the happening of the condition (r)

Money lent

(l) *Battle v Faullner* (1520) 3 B & Ald 288 *Howell v Young* (1861) 3 B & C 269 260 If no damage has resulted from the breach the plaintiff is entitled to nominal damages see title DAMAGES Vol X pp 305 308

(m) *Battle v Faullner supra* *Howell v Young supra*

(n) *Howell v Young supra* *Brown v Howard* (1820) 2 Brod & Bing 73 *Smith v Ix* (1845) 6 Haic 346 *Wood v Innes* (1859) 61 L T 501 see *Pear v Wade* (1885) Cab & El 519 As to fraud see p 49 post

(o) *Henton v Fmblers* (1621) 3 Burr 118 *Waters v Hanet (Earl)* (1842) 2 Q B 707 compare *Hammond v Smith* (1864) 33 Beav 402 Where the promise is to pay a debt whenever my circumstances enable me to do so and I may be called upon for that purpose no demand is necessary and the cause of action arises when the debtor is able to pay although the creditor makes no demand and has no knowledge or notice of the debtor's ability to pay (*Waters v Hanet (Earl) supra*)

(p) *Hebb v Martin* (1661) 1 Lev 48 *Shutford v Borough* (1628) Codb 457 *Bill v Lale* (1629) Het 136

(q) *Collins v Lennuy* (1601) 12 Mod Rep 441 The fact that the debt is to be repaid with simple or even compound interest makes no difference (*Norton v Lillan* (1837) 2 M & W 461 *Jackson v Ouf* (1809) John 391) But as to such a promise by a surety see title GUARANTEE Vol XV p 486 and see p 41 post In the case of a statutory obligation e.g. to pay on demand the expenses of paving a street (see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 203 223) time does not run until a demand of payment is made on the person from whom the expenses are sought to be recovered and in case of change of ownership a fresh demand must be made (*Hampstead Corporation v Cantt* [1903] 2 K B 1 but see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 236)

(r) *Larker's Claim* [1894] 3 Ch 290 C A When money is lent and a date for repayment is specified the cause of action accrues on that date and a clause in the contract authorising the sale of any security given and containing an undertaking by the debtor to pay the difference between the amount then due and the proceeds of the sale does not give rise to a new cause of action (*ibid*) As to money lending generally see title MONEY AND MONEY-LENDING In *Atkinson v Bradford Indd Equitable Benefit Building Society* (1890) 25 Q B D 377 C A where the money was only repayable on the production by the lender personally or by someone with his written authority of a loan pass book it was held that the statute did not run until the pass book had been produced.

**SECT 4**  
**When Time**  
**begins to**  
**Run**

Debt  
payable by  
instalments.

Bill or note  
payable on  
demand

Bill payable  
at sight

Bill accepted  
in blank

Bill payable  
at a fixed  
time.

If no time is specified the statute runs from the date of the loan (a)  
If in an agreement for the repayment of an existing debt by instalments it is provided that on default of payment of any instalment the whole debt shall be recoverable the statute runs as to the whole debt from the time of the first default in payment of an instalment (a)

**67** If a bill or note is payable on demand the statute runs from the date of making or accepting and no demand is necessary (b)  
If however a note payable on demand is deposited with a banker for delivery to the payee on his producing another note cancelled, the statute only runs from the time the note is so delivered by the banker (c)

A bill payable at sight must be presented within a reasonable time (d) and the statute runs from its presentment (e) but as between the holder and the drawer no time less than six years is unreasonable for presentment unless some loss be caused to the drawer by the delay (f) Where presentment is unnecessary (g), the statute runs from the time when the holder first becomes aware of some fact that makes presentment unnecessary (h)

If a bill is accepted in blank and is not filled up for more than six years the acceptor is none the less liable at the suit of a bona fide holder for value and in such a case time does not run against a bona fide holder for value until the bill as filled up becomes due (i)  
But if such a bill remains uncompleted in the hands of the payee for more than six years the payee cannot then fill up the bill and sue the acceptor on it (k)

In the case of a bill or note payable at a fixed time after date the statute runs only from the time at which the bill or note becomes due even although the action is for money lent for which the note is a security because the money does not become payable till the time has expired (l) If a bill is payable at a specified period after sight or demand the statute does not run till the

(a) *Guden v Bruce* (1565) 1 R 3 C P 300 If a cheque is given for the money agreed to be lent the statute runs not from the giving but from the cashing of the cheque (*ibid*)

(i) *Hemp v Garland* (1843) 4 Q B 519 *Reeves v Butcher* [1891] 2 Q B 509 C A see *Irving v Veitch* (1831) 3 M. & W 90 *Re Stock* 1 s parte *Amis* (1596) 66 I J (Q B) 146 see *McDonnell v Broderick* [1896] 2 I R 136 C A

(b) *Norton v Ham* (1831) 2 M. & W 461 *Christie v Bunsick* (1811) 1 Selwyn Law of Nisi Prius 13th ed 301 *Rumball v Ball* (1711) 10 Mod Rep 38 *Re Croye Francis v Bruce* (1590) 44 Ch D 627 see p 43 ante

(c) *Savage v Aldren* (1811) 2 Stark 332

(j) See title **BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II** pp 525-531

(e) *Ibid* p 416 *Re Boyse Crofton v Crofton Canonge's Claim* (1886) 33 Ch D 612

(f) *Laws v Rand* (1857) 30 B (N S) 442 *Robinson v Hawkeford* (1846) 9 Q B 52

(i) See *Terry v Parker* (1831) 6 Ad & El 502 *Wirth v Austin* (1875) 1 R 10 (P 689) and title **BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II** pp 533 et seq 541

(h) See *Re Bethell Bethell v Bethell* (1887) 34 Ch D 561

(l) *Moutaque v Perkins* (1853) 2 L J (C P) 181

(k) See *Re Bethell Bethell v Bethell supra*

(j) *Wittersheim v Carlisle (Lady)* (1791) 1 Hy Bl 631 *Buckler v Moor* (1671), 1 Mod Rep 89

expiration of such period (m) In a case in which days of grace are allowed the cause of action on a dishonoured bill or note does not arise against the acceptor or the drawer or indorsee until after the expiration of the last day of grace (n) If a bill of exchange is dishonoured by non acceptance the statute begins to run against the payee immediately notice of dishonour is given (o) but the holder of a bill is not obliged to present it for acceptance he may wait till the time for payment arrives and then present it for payment in such a case time would not run against the holder till the expiration of the period fixed for payment (p)

SECT 4  
**When Time  
begins to  
Run**

Days of grace  
Dishonour by  
non  
acceptance

**68** If a cheque is duly presented and dishonoured an action will lie against the drawer but no such action will lie without presentment unless there are special circumstances which render presentment unnecessary (q)

Cheques

If a cheque is not presented within a reasonable time no cause of action accrues against the drawee upon payment being refused and the holder can sue only upon the original consideration for which the cheque was given or on the new promise to pay which arises on the cheque being given for an existing debt (r)

Delay in  
presentment.

**69** Upon a contract to indemnify the statute runs from the time when the plaintiff is actually damaged not from the time when the event happens which causes the loss (a) Thus if a debtor authorises another person to draw a bill on the debtor for the amount of the debt and the debtor refuses to accept the bill so drawn and the drawer is compelled to pay the statute runs not from the refusal to accept but from the time when the drawer is compelled to pay (b) But if a bill is dishonoured by non payment and the payee who indorses the bill is sued by an indorsee and compelled to pay the right of the payee to sue the drawer is barred at the expiration of six years from the time when the bill was dishonoured (c)

Contract to  
indemnify

In an action on a policy of insurance for loss occasioned by the

Barratry

(m) *Thorpe v Louth* (1826) Ry & M 385 *Thorpe v Combe* (1826) 8 Dow & Ry (K B) 341 see *Moore v Litchell* (1806) 22 Beav 112

(n) See title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II pp 417 418 *Morris v Richards* (1891) 40 L J 210 (where the last day was Sunday) *Ferguson v Douglas Heron & Co* (1796) 6 Bro Parl Cas 216

(o) *Whitehead v Walker* (1842) 9 M & W 506 see *Wilkinson v Verity* (1871) L R 6 C 1 206 209 title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II p 509

(p) *Whitehead v Waller supra* at p 515

(q) Bills of Exchange Act 1882 (47 & 48 Vict c 61) ss 46 73 see title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II pp 518 528 531 *et seq*

(r) See *Re Bethell Ex parte Bethell* (1887) 34 Ch D 561 and title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II pp 515 531

(a) *Collinge v Heywood* (1839) 9 Ad & El 633 overruling *Bullock v Lloyd* (1820) 2 C & P 119 *Funstell v Bartlett Knowles v Bartlett* (1866) 14 L T 400 see title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II p 559 note (a) *Angrave v Lippett* (1865) 11 L T 708 As to the operation of the statute on the liability of a husband for his wife's ante nuptial debts see title HUSBAND AND WIFE Vol XVI pp 409 note (c) 411

(b) *Huntley v Smith* (1833) 1 Cr & M 467

(c) *Webster v Aul* (1802) 17 Q B 944



**SECT 4** barratry of a captain in taking his ship out of her course and  
**When Time** procuring her to be condemned and sold, as the barratry is not  
**begins to** complete until the ship is delivered to the purchaser, only then does  
**run.** the statute begin to run (*d*)

**Land** The cause of action for an indemnity under the Land Transfer  
**Transfer Act** Act, 1897 (*e*) s 7, is deemed to arise at the time when the claimant  
**1897** knows, or but for his own default, might know, of the existence of  
 his claim (*f*)

**Surety and** **70** As between a surety and a creditor the statute runs in  
**creditor** favour of the surety, when he becomes liable to make a payment to  
 the creditor (*g*)

Thus claims in respect of advances made more than six years  
 before action will as against the guarantor of a banking account  
 be barred though claims in respect of interest and commission  
 which accrued due within that period may not (*h*)

In the case of the guarantee of the payment of a mortgage debt  
 time runs in favour of the surety not from the date of the loan  
 but from the expiration of a reasonable time after that date during  
 which time the mortgagee must be treated as having agreed not  
 to sue (*i*) If the guarantee is to pay on demand time runs only  
 from a demand (*j*) while if the guarantee is for the safety of the  
 money advanced time only runs from the date when the security  
 is shown to be unsafe (*k*)

**Surety and** If a surety pays the debt or part of it the statute runs against his  
**principal** right to recover from the principal from the time when such payment  
 was made (*l*)

**Co-sureties** As between co sureties co contractors or co debtors the statute  
 runs against the right of contribution of one who has paid more  
 than his share from the time of such payment (*m*) it is immaterial  
 that at the time of the action for contribution the statute may have  
 run between the principal creditor and the co surety who is sued  
 for contribution (*n*) A co surety who has been called upon by

(*d*) *Hibbert v Martin* (1808) 1 Camp 338 and see title INSURANCE Vol XVII pp 444 445

(*e*) 60 & 61 Vict c 65

(*f*) *Ibid* s 7(7) As to this section see 1 *Gr v Odell* [1906] 2 Ch 47 C A and title REAL PROPERTY AND CHATTELS REAL and see pp 40 41 ante

(*g*) *Colvin v Buckle* (1841) 8 M & W 680 *Holl v Hadley* (1835) 2 Ad & El 758

(*h*) *Parr v Banlinc Co v Yates* [1898] 2 Q B 460 C A see title GUARANTEE Vol XV pp 482 483 492 501 note (*i*) As to a claim for interest ceasing as a rule where the claim to the principal is barred see p 68 post

(*i*) *Henton v Paddison* (1893) 68 L T 405

(*j*) *Re Brown's (J) Estate Brown v Brown* [1893] 2 Ch 300 see title GUARANTEE Vol XV p 488

(*k*) *Sheers v Humbleby & Son* (1897) 76 L T 709 711 C A Compare the cases of guarantee of mortgage debt by specialty p 77 post

(*l*) *Davies v Humphreys* (1840) 6 M & W 153 *Considine v Considine* (1846) 9 L R 400 As to the time when the right of exoneration arises see title GUARANTEE, Vol XV p 519 and the cases cited note (*u*) *ibid*

(*m*) *Davies v Humphreys* *supra* *Re Snowden Ex parte Snowden* (1881) 17 Ch D 41 C A, *Gardner v Broole* [1897] 2 I R 6 C A and as to the right of contribution, see title GUARANTEE Vol XV pp 526—530

(*n*) *Wolmershausen v Gullick* [1893] 2 Ch 514, *Gardner v Broole* *supra*

the creditor to pay the whole of the debt may although he has paid nothing, bring an action against his co surety who has not been called upon to pay to compel him to contribute towards the common liability, and the statute does not run against his right to bring such an action until the claim of the creditor has been established against the surety (o)

SECT 4.  
When Time  
begins to  
Run.

71 While a partnership is subsisting the statute has no application to the claim of one partner against another in respect of rights arising out of the partnership (p)

Partners.

72 In an action against a factor for not accounting the statute does not run until demand the contract being to account on demand (a)

Factor

In an action for money had and received to recover the consideration for the purchase of a void annuity the statute runs from the time when the annuity is set aside (b)

Money had  
and received

If money is paid into a bank on deposit account the statute does not run against an action to recover it until demand is made for its return (c) In the case of money on current account time runs from the payment in (d)

Cash at bank

In an action for money paid by mistake common to both parties the cause of action runs from the time of payment and no demand is necessary (e)

Money paid  
by mistake

In an action for money paid for the use of another where from the mere payment the law implies a promise to repay on demand the statute runs from the payment but where no such promise is implied by law the statute does not run until the payment is adopted by the person on whose behalf it is made (f)

Money paid  
for the use of  
another

(o) *Wolmershausen v Gulluck* [1893] 2 Ch 514 *Robinson v Harlin* [1896] 2 Ch 415 (liability of co trustee for breach of trust) and see title GUARANTEE Vol XV pp 520 529

(p) *Barton v North Staffordshire Rail Co* (1888) 38 Ch D 458 463 and see *Noyes v Crawley* (1818) 10 Ch D 31 (dissenting from *Miller v Miller* (1869) L R 8 Ex 449) *Anon v Gye* (1872) L R 5 H L 606 *Chan Hin San v Ho Fung Hang* [1902] A C 251 compare *Beljemann v Beljemann*, [1895] 2 Ch 474 C A title PARTNERSHIP and see p 111 post

(a) *Topham v Braddick* (1809) 1 Taunt 512 After a reasonable time had elapsed (e.g. fourteen years) a jury might presume that a demand had been made and that the factor had accounted (*ibid*) As to factors see title AGENCY Vol I pp 152 153

(b) *Cowper v Goldmond* (1833) 9 Bing 748 *Huggins v Coates* (1843) 5 Q B 432 As to claims for money had and received see title CONTRACT Vol VII pp 472 et seq

(c) *Re Todd Tidd v Overell* [1893] 3 Ch 154 156 As to the general deposit of money with a bailee see title BAILEMENT Vol I p 541

(d) *Foley v Hill* (1845) 2 H L Cas 28 *Pott v Cleqq* (1847) 16 M & W 321 and see title BANKERS and BANKING Vol I pp 555 588

(e) *Baker v Courage & Co* [1910] 1 K B 56 compare *Freeman v Jeffries* (1869) L R 4 Exch 189 per MARIN and BRAMWELL BB at pp 199, 200, see also *Re Robinson McLaren v Public Trustee* [1911] 1 Ch 502, and title MISTAKE

(f) Thus if a sub tenant voluntarily pays rent due by the mesne landlord to the head landlord the statute does not run until the mesne landlord adopts the payment (*Ahearne v M Swiney* (1874), 8 I E C L 568) If such a payment be made by compulsion the statute runs from the payment, see *Grogan v Ryan* [1902] 2 I E 196 C A

|   |  |
|---|--|
| <b>SECT 4</b><br><b>When Time</b><br><b>begins to</b><br><b>Run</b> | If goods are sold on credit, the statute runs not from the sale or delivery of the goods, but from the time when the term of credit expires (g)  |
| <b>Goods sold on credit</b><br><b>Work done</b>                     | On a general contract for work to be done the cause of action accrues when the work is done (h) But a contract to do work may contain a condition that the price should be paid out of a certain fund or when a certain contingency has happened and in such a case the cause of action does not arise until the fund comes into existence or until the contingency has happened (i)   |
| <b>Solicitors costs</b>   | <p><b>73</b> If a solicitor sues for his costs in an action the statute only begins to run from the date of the termination of the action or of the lawful ending of the employment of the solicitor (k)</p> <p>If there is an appeal from the judgment in the action the statute does not begin to run against the solicitor if he continues to act as such till the appeal is decided (l) But when judgment has been given and there is no appeal the statute runs from the judgment and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute (m)</p> |
| <b>Miscellaneous work</b>   | <p>This rule applies only to such continuous work as bringing and prosecuting or defending an action in respect of miscellaneous work done by a solicitor the statute runs from the completion of the whole of each piece of work (n)</p>  |
| <b>Delivery of bill</b>   | <p>A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill but nevertheless time runs against a solicitor from the completion of the work and not from the delivery of the bill (o)</p>  |
| <b>Copyhold fines</b>   | <p><b>74</b> In an action for a fine due on the admittance of a copyhold tenant time runs against the lord from the admittance and even where the fine is arbitrary time runs from the admittance, not from the assessment of the fine (p)</p>   |

(g) *Helps v Winterbottom* (1831) 2 B & Ad 431 and see title SALE OF GOODS

(h) *Fmery v Day* (1641) 1 Cr M & P 24, per PARKE B at p 248 see *Hyde v Partridge* (1803) 2 Id Raym 104 and see title WORK AND LABOUR

(i) *Re Kensington Station Act* (1815) L R 20 1 q 197 *Re Gloucester Aberystwith and Central Wales Rail Co* (1860) 2 C 117 41 *North Metropolitan Railway and Canal Co* (1893) 71 T F 836 C A (solicitor's costs)

(k) *Nicholls v Wilson* (1845) 11 M & W 106 *Harris v Osbourne* (1834) 2 Cr & M 629 *Martindale v Walker* (1846) 2 C B 106 *Whitehead v Lord* (1852), 7 Exch 691 *Underwood Sen and Payer v Lewis* [1894] 2 Q B 306 C A See also title SOLICITORS

(l) *Harris v Quine* (1869) 1 R 4 Q B 653

(m) *Lothery v Munnings* (1830) 1 B & Ad 13 compare *Re Hall and Barker* (1878) 9 Ch D 538 *Re Lee on Son and Hastings* (1883) 30 Ch D 1 C A see *Re Cartwright* (1873) 1 R 16 Eq 469 *Re Romer and Haslam*, [1893] 2 Q B 296 C A *Baile v Baile* (1842) L R 13 Fq 49

(n) *Beck v Iersee* (1889) 23 Q B D 316 323 C A *Phillips v Broadley* (1846) 9 Q B 44 As to a solicitor pleading the statute see *Re Triston* (1850) 11 M & P 74 As to an action against a solicitor for negligence see p 51 post

(o) *Ciburn v Colledge* [1891] 1 Q B 702 C A and see *Cheese v Keen* [1908] 1 Ch 245 As to the effect of a lien see p 42 ante and title LIEN p 3 ante

(p) *Mitchton v Payne* [1839] 2 Q B 603 see *Fraser v Mason* (1883) 11 Q B D 514 C A

**75** In an action to enforce an award of compensation under the Lands Clauses Act 1845 the statute does not run till the date of the award (g)

**SECT 4**  
**When Time**  
**begins to**  
**Run**

**SUB SECT 3—In Actions of Tort**

In an action of deceit if damages are claimed the statute runs from the time when the plaintiff acted on the fraudulent representation unless the existence of the fraud has been fraudulently concealed by the wrongdoer in which case time runs only from the date of the discovery of the fraud, or from the date when the person injured might by the use of due care have discovered the fraud (a) So also in a case of fraudulent conversion of stock time runs from the discovery of the fraud (b)

Compensation  
award  
Fraud  
Fraudulent  
concealment

If one person furtively takes the minerals of another by means of a wilful and secret underground trespass and no laches is attributable to the owner of the minerals in not discovering the existence of the wrongful workings by the trespasser the statute has no application till the fraudulent trespass is discovered and it is not necessary to prevent the application of the statute that there should have been on the part of the wrongdoer any active measures to prevent detection (c) But if the wrongful working of minerals

Fraudulent  
taking of  
minerals

(g) *Turner v Mullan Rail Co* [1911] 1 K. B. 532 see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 76

(a) *Thomson v Clanmorris (Lord)* [1900] 1 Ch. 181 *A Gibbs v Guild* (1855) 9 Q. B. D. 59 C. A. *Barber v Houston* (1884) 14 L. R. Ir. 213 see *Armstrong v Millburn* (1886) 54 I. L. 241 723 C. A. Before the Judicature Act 1873 (36 & 37 Vict. c. 66) there was a variance between courts of law and courts of equity as to the effect of the fraudulent concealment of the cause of action in those cases where there was a concurrent remedy both at common law and in equity the courts of common law holding that in spite of such concealment the statute ran from the time when the cause of action arose except when the concealment was of itself an actionable wrong (*Imperial Gas Co v London & South Sea Co* (1854) 10 F. & C. 39 *Hunter v Gibbons* (1856) 1 H. & N. 451) the courts of equity holding that the statute in such cases ran from the time of the discovery only (*Booth v Harrington (Earl)* (1814) 4 Bro. Parl. Cas. 163 *South Sea Co v Wymondsell* (1832) 3 P. Wms. 143 *Hovenden v Annesley (Lord)* (1806) 2 Sch. & Lef. 607 634 *Blair v Bromley* (1847) 2 Ph. 354) The effect of the Judicature Act 1873 (36 & 37 Vict. c. 66) s. 25 (11) is to cause the equitable rule to prevail in all cases in which before that Act there was a concurrent remedy at common law and in equity In actions at common law where there was no concurrent remedy in equity before the Act the common law rule prevails as regards the original cause of action but where the fraudulent concealment is of itself a cause of action time runs against the common law remedy of the persons defrauded from the discovery of the fraud see *Barber v Houston supra* *Armstrong v Millburn supra* *Quere* whether the rule as to fraudulent concealment of a cause of action applies in any case except where the transaction giving rise to the cause of action is of a fraudulent nature (*Barber v Houston supra* *Armstrong v Millburn supra*) As to fraud at common law see *Bree v Holbeck* (1881) 2 Dougl. (K. B.) 654 As to the bringing into account of money paid under a misrepresentation see *Smith v Alsop* (1824) McCle. 622 As to the limitation of time in an action for compensation for untrue statements in a company's prospectus see title COMPANIES Vol V pp 136—140 As to the limitation of time in an action for replacement of shares consequent on the registration of a forged transfer see *ibid* pp 697 698 See further p 112 *post* title EQUITY Vol XIII pp 110 115, and, as to actions of deceit see title MISREPRESENTATION AND FRAUD

(b) *Re Crosley Munns v Burn* (1887) 35 Ch. D. 266 C. A.  
(c) *Bulls Coal Mining Co v Osborne* [1899] A. C. 351 P. O.

**Sec. 4.**  
**When Time**  
**begins to**  
**Run.**

**Misrepresenta-**  
**tion.**

**Partners.**

**Trover and**  
**detinue**

**Of goods**

is only inadvertent, the statute runs from the date of the working (d)

If the rescission of a contract or deed is claimed on the ground of fraudulent misrepresentation, time does not begin to run until the person defrauded knew all the facts which would have entitled him to bring the action for rescission (e) But in order to prevent the statute running, the fraud must be that of the party sued or of his agent acting within his authority (f)

In the case of a claim based on concealed fraud, by the representatives of a deceased partner against the surviving partner the latter cannot set up the statute as a defence and allege that his co partner might by the use of due care have discovered the fraud for one partner is entitled to rely on the good faith of his co partners (g)

**77** In an action of trover although the plaintiff is ignorant of the conversion (h) time runs from the conversion unless it was effected by fraud (i) The mere taking away or destroying a part of property the rest of which remains in the hands of a bailee is not such a conversion as enables the owner to sue in trover for the whole nor can the bailee when sued set up such taking away or destruction of a part as a conversion of the whole for the purpose of supporting a plea of the statute (k) If goods have been converted and afterwards sold and the plaintiff waives the tort and sues for money had and received time still runs from the conversion and not from the receipt of the money (l)

If goods come into the possession of a person with the consent of the owner who is entitled to their delivery on demand, time does not run against the owner's right to recover them until there has been such demand and refusal to deliver by the bailee (m) The rule is the same where the goods of a person are in

(d) *Dean v Lhwyte* (1855) 21 Beav 621 *Trotter v Maclean* (1819) 13 Ch D 574 *Re Astley and Tyldesley Coal and Salt Co and Tyldesley Coal Co* (1899) 68 I J (Q B) 252 The dictum to the contrary in *Ecclesiastical Commissioners for England v North Eastern Rail Co* (1871) 4 Ch D 845 per *MAITINS V C* at p 560 has been frequently disapproved see *Bull's Coal Mining Co v Osborne* [1899] A C 351 P C *Re Astley and Tyldesley Coal and Salt Co and Tyldesley Coal Co supra* Omitting to enter workings in a map is not of itself sufficient evidence of fraud (*Dawes v Bagnall* (1875) 23 W R 690) and see title MINES MINERALS AND QUARRIES

(e) *Molloy v Mutual Reserve Life Insurance Co* (1906) 94 L T 756 C A see *Barber v Houston* (1884) 14 L R Ir 273 *Redgrave v Hurd* (1881) 20 Ch D 113 C A As to the necessity for acting promptly see title EQUITY Vol XIII p 174

(f) *Thorne v Heard and Marsh* [1895] A C 495

(g) *Betzemann v Betzemann* [1895] 2 Ch 474 C A see *Raulins v Wickham* (1858) 3 De G & J 304 C A and see title PARTNERSHIP

(h) *Granger v George* (1826) 5 B & C 149 see *Edwards v Clay* (1860) 28 Beav 145 *Hinchliffe v Sharpe* (1898) 77 I T 714 title TROVER AND DETINUE

(i) See p. 49 ante.

(k) *Philpott v Kelley* (1835) 3 Ad & El 106 and see titles ACTION Vol I p 23 BAILMENT Vol I p 565

(l) *Denny v Shuckburgh* (1840) 4 Y & C (ex) 42 see *Goding v Ferris* (1791) 2 Hy Bl 14 *Crook v M Tavish* (1823) 1 Bing 167 *Fraser v Swansea Canal Co* (1834) 1 Ad & El 354

(m) *Wilkinson v Verity Ltd* (1871) L R 6 C P 206, *Montague (Wortley) v Sandwich (Lord)* (1702) 7 Mod Rep 99, *Edwards v Clay* (1860), 28 Beav.

## PART II.—SIMPLE CONTRACT DEBTS AND PERSONAL ACTIONS

the possession of another who holds them in ignorance of the right of the owner (n)

If a person is in possession of land, such possession justifies the possession of the title deeds, and time does not begin to run against an action to recover the title deeds, so long as the person is in possession of the land (o)

**78** Where one is employed by another to perform a duty the failure to perform or negligence in the performance of such duty gives rise to a cause of action, and the statute runs from the date of such non performance or negligence and not from its being discovered or from the occurring of damage (a)

**79** In an action for trespass to land or goods the statute runs from the time when the trespass is committed or if several acts of trespass are committed from the date of each act (b)

If a tenant for life impeachable for waste fells timber the statute begins to run against the remainderman from the time of the felling or if the remainderman waives the tort and sues for money had and received from the time when the timber becomes money in the hands of the wrongdoer (c)

False imprisonment is a continuing cause of action or a fresh cause of action arises as long as the imprisonment continues hence if the imprisonment began more than four years before action but continued to a time within that period damages for so much of the imprisonment as took place within the four years before action may be recovered although a plea of the statute prevents the recovery of damages for so much of the imprisonment as took place outside that period (d)

In an action for malicious prosecution the cause of action is the institution or prosecution of criminal proceedings and time runs from the close of the proceedings not from any imprisonment which follows as the result thereof (e)

SECT. 4

**When Time begins to Run.**

Action for title-deeds.

Negligence

Trespass.

Waste.

False imprisonment.

145 *Compton v Chandless* (1801) 4 Fsp 18 and see titles ACTION Vol I pp 23 24 BAILMENT Vol I p 565 As to the deposit of money see p 41 ante

(n) *Spaulman v Foster* (1883) 11 Q. B. D. 99 *Miller v Dell* [1891] 1 Q. B. 468 C. A. (title deeds fraudulently taken and deposited as security)

(o) *Plant v Cottrell* (1860) 5 H. & N. 430 see *Wells* (Dean and Chapter) v *Dodlington* (1845) 2 Coll. 13

(a) *Howell v Young* (1826) 5 B. & C. 259 *Shurt v M. Carthy* (1820) 3 B. & Ald. 626 *Smith v Fox* (1818) 6 Ilare 386 *Hughes v Linsden* (1866) 35 L. J. (OH) 481 *Bean v Wade* (1885) Cab. & El. 519 *Wood v Jones* (1889) 61 L. T. 651 and see title NEGLIGENCE The result is the same whether the action is founded on tort or on breach of a contract to use due care (*Howell v Young supra per BAYLEY J.* at p. 266) As to tort generally see title TORT

(b) Thus in an action for mesne profits which is an action of trespass only arrears for six years before action can be recovered (Buller's Law of Nisi Prius 88 Adams' Action of Ejectment 4th ed. 339 *Reade v Leade* (1801) 5 Ves. 744) and see title TRESPASS As to actions of devastavit see p. 40 ante and title EXECUTORS AND ADMINISTRATORS Vol. XIV pp. 31 et seq.

(c) *Higginbotham v Hawkins* (1872) 7 Ch. App. 676 *Seagram v Knight* (1867) 2 Ch. App. 628 see *Hughes v Thomas* (1811) 13 East 414 As to waste by a tenant for life who is also entitled to the first estate of inheritance see p. 53 post and as to equitable waste see p. 138 post See also titles LANDLORD AND TENANT Vol. XVIII pp. 430 496 et seq. SETTLEMENTS

(d) *Coventry v Apsley* (1691) 2 Salk. 420 see *Massy v Johnson* (1810) 12 East 67 *Bailey v Warden* (1818) 4 M. & S. 400

(e) *Violet v Sympton* (1801) 8 E. & B. 344

**SECT 4**  
**When Time**  
**begins to**  
**Run**  
**Libel and**  
**slander**

**80** In an action of libel if there is only one act of publication, the statute runs from the publication but if the publication is a continuous act as where a book or newspaper is published and offered for sale, the statute does not run as long as the libel is on sale (*f*) In an action for slander, when the words are actionable without proof of special damage the statute runs from the uttering of the slander (*g*) When the words are not actionable without special damage the statute does not run until the damage occurs (*h*)

**Where**  
**damage is**  
**part of the**  
**cause of**  
**action**

**81** Where damage is part of the cause of action and no act is committed which is of it self wrongful the statute runs from the date of the damage and not of the act which causes the damage (*i*) Thus if a lessee of minerals works them and leaves insufficient support for the surface which belongs to another person and damage in consequence occurs to the surface more than six years after the working of the minerals the statute runs from the occurrence of the damage and not from the working of the mine or from the leaving of insufficient support (*k*) Where there has been a continuance of the damage a fresh cause of action arises from time to time as often as damage is caused (*l*) If the owner of the mines works them and causes damage to the surface more than six years before action and within six years of action a fresh subsidence causing damage occurs without any fresh working by the mine owner an action in respect of the fresh damage is not barred as the fresh subsidence resulting in injury gives a fresh cause of action (*m*) If in such case the subsidence causing damage is continuous there is a continuing cause of action as long as the subsidence continues (*n*)

**Continuing**  
**cause of**  
**action**

(*f*) *Brunswick (Duke) v Harmer* (1841) 14 Q. B. 185 (where an action was brought in 1848 to recover damages for a libel published in a newspaper in 1830 and the plea of the statute was held to be negatived by proof of the sale of one copy just before action)

(*g*) The period of limitation in this case is two years see p 38 *ante* As to when words are actionable without proof of damage see title LIBEL AND SLANDER Vol XVIII p 607

(*h*) *Saunders v Edwards* (1662) 1 Sid 90 *Littlebury v Wright* (1662) 1 Sid 90 see *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 In such a case the period of limitation is six years from the happening of the damage see p 38 *ante*

(*i*) *Bacl house v Bonomi* (1861) 9 H. L. Cas 503 see *Whitehouse v Fellows* (1861) 10 C. B. (N. S.) 760 *Hidsden v Harridge* (1669) 2 Wms Saund 6th ed 61 m 63 e *Ll yd v Huqney* (1830) 6 Bin 489 *Wordsworth v Harley* (1830) 1 B & Ad 391 *J bits v Read* (1812) 16 Last 215 *Gillon v Bodlington* (1824) Ry & M 161 *Howell v Young* (1876) 5 B & C 259 and see title DAMAGES Vol X pp 308 *et seq*

(*k*) *Barkhouse v Bonomi supra*

(*l*) *Whitehouse v Fellows supra* *Battishell v Reed* (1856) 18 C. B. 696 *Devery v Grand Canal Co* (1810) 9 I. B. C. L. 194 Ex Ch

(*m*) *Darley Main Colliery Co v Mitchell supra* overruling *Lamb v Walker* (1818) 3 Q. B. D. 389 see *West Leigh Colliery Co Ltd v Tunncliffe and Hampson Ltd* [1906] A. C. 21 title DAMAGES Vol X p 310

(*n*) *Crumble v Waller d l al Board* [1891] 1 Q. B. 503 C. A. *Fairbrother v Bury Rural Sanitary Authority* (1889), 37 W. R. 644 *Hole v Chard Union* [1894] 1 Ch. 293 C. A.

## SUB SECT 4—Persons Capable of Suing or of being Sued (a)

## SECT 4

**82** A cause of action cannot accrue unless there be a person in existence capable of suing (*p*) and another person in existence who can be sued (*q*)

When Time  
begins to  
Run

**83** If a person to whom a cause of action would have accrued had he been living dies intestate before the time when the cause of action would have accrued if he were living the statute does not begin to run until administration is taken out (*r*) but the statute runs against an executor from the accrual of the cause of action if the executor acts or takes out probate (*s*) If probate is not granted for more than six years from the accrual of the cause of action and no action is brought before probate it seems that the executor's claim would be barred (*t*) If probate is granted and afterwards revoked and an administrator is appointed the statute does not run against the administrator until letters of administration have been granted (*u*)

When cause  
of action  
accrues  
Death of  
person  
entitled  
Adminis-  
trator  
Executor

**84** If a cause of action accrues to a convict while he is still under incapacity as such and no administrator or *interim* curator of his property is appointed time it seems would not begin to run against him until the determination of the incapacity (*a*)

Convict

**85** If waste is committed by a tenant for life impeachable for waste who is also entitled to the first estate of inheritance no action can be brought till the death of the tenant for life such a claim against his estate must be brought within six years of his death (*b*) If the tenant for life and the remainderman are different persons and the remainderman dies before the tenant for life and the tenant for life becomes administrator of the remainderman no such action can be brought during the life of the administrator (*c*)

Tenant for  
life and re-  
mainderman

(a) As to the operation of the statute with regard to claims against the estates of deceased persons see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 144 145 204

(p) *Murray v East India Co* (1821) 5 B & Ald 204 per ABBOTT CJ at p 214 As to disabilities see p 56 post

(q) *Douglas v Forrest* (1826) 4 Bing 686 per BEST CJ at p 704 Compare the cases as to lunatics pp 16 171 post

(r) *Sanders v Stanford* (1819) cited in *Saffyn v Adams* (1605) Cro Jac 60 see *Pratt v Swaine* (1828) 8 L & C 265 *Hyde v Price* (1831) Coop Ir (as 193 and cases cited in title EXECUTORS AND ADMINISTRATORS Vol XIV p 230 note (g))

(s) See title EXECUTORS AND ADMINISTRATORS Vol XIV pp 144 145 230 As to actions against personal representatives see p 54 post

(t) *Chan Ait San v Ho Iung Hang* [1902] A C 201 I C

(u) See the Forfeiture Act 18 0 (33 & 34 Vict c 3) ss 7 8 titles ACTION Vol I p 29 CRIMINAL LAW AND PROCEDURE Vol IX p 429 By the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 91) s 10 imprisonment of a plaintiff ceased to be a cause of incapacity but the Forfeiture Act 1870 (33 & 34 Vict c 23) seems to have reimposed the disability in the case of a convict as defined therein when there is no administrator or *interim* curator appointed

(b) *Burch Wolfe v Burch* (1870) L R 9 Eq 683

(c) *Seagram v Knight* (1867) 2 Ch App 628 As to the presumption of payment keeping debt alive when the hand which is to pay is the same as the hand which should receive see p 12 post



**SECT 4**  
**When Time**  
**begins to**  
**Run**

There must  
 be a person  
 who can be  
 sued  
 Time once  
 running  
 will continue  
 to run  
 Death

Bankruptcy

Suspension  
 of cause  
 of action

**86** If a debtor is in such a position that even if an action were brought, and judgment given, against him, the judgment could not be enforced, a cause of action cannot accrue against him (*d*)

**SUB SECT 5—When Time continues to Run**

**87** Time which has once begun to run will as a rule continue to do so even though subsequent events occur which make it impossible that an action should be brought This rule holds good with respect to all Statutes of Limitation (*e*)

Thus, if time has begun to run against a person entitled to sue or in favour of a person capable of being sued the fact of his death and that there is an interval between his death and the grant of administration does not prevent time from running against (*f*), or in favour of (*g*) the administrator as the case may be If however a debtor takes out administration to his creditor this, being an act of law suspends the remedy and the statute ceases to run during the administration (*h*)

So in respect of debts provable in bankruptcy the statute ceases to run during the bankruptcy but will continue to run afresh if and when the bankruptcy is annulled (*i*) In the case however of the bankruptcy of a creditor the statute runs against the trustee (*k*)

**88** At common law the right to bring an action could not be suspended by the act of the party for if the right was suspended it was extinguished (*a*) But if a negotiable instrument is taken in

(*d*) *Lq* Ambassadors see titles ACTION Vol I p 19 20 CONSTITUTIONAL LAW Vol VI pp 42b *et seq* As to the operation of the statute with regard to claims against the estates of insolvent persons see titles ACTION Vol I p 21 BANKRUPTCY AND INSOLVENCY Vol II p 202

(*e*) *Homfray v Scrope* (1849) 13 Q B 509 512 *Smith v Hill* (1746) 1 Wils 134 *Doe d Duroure v Jones* (1791) 4 Term Rep 300 *Rhodes v Smethurst* (1835) 4 M & W 42 affirmed (1840) 6 M & W 351 Ex Ch *Hewlett v Lambert* (1840) 2 I Eq R 274 see *Steffington v Whitehurst* (1831) 3 Y & C (EX) 1 34 *Doe d Griggs v Shane* (1818) 4 Term Rep 306 n (*b*) *Stouel v Louch (Lord)* (1669) 1 Plowd 353 366 *C tterell v Dutton* (1811) 4 Taunt 826 *Gray v Mende* (1723) 1 Sta 556 *Wilcox v Huggins* (1750) 1 Barn (K B) 335 (181) 2 Barn (K B) 5 *Copley v Dorlmain que* (1816) 2 Lev 166 *M Donnell v Broderick* [1896] 2 I R 136 It was held in *Prudeau v Webber* (1661) 1 Lev 31 that when time had begun to run it continued to run although the courts were closed in consequence of rebellion (see *Beckford v Wade* (1805) 17 Ves 57 93 P C and *Bynnon's Case* (1667) cited in *Hall v Wybourn* (1689) 2 Salk 420) The fact that the last day of the statutory period is a non juridical day does not excuse a plaintiff who commences his action on the next day (see *Morris v Richards* (1881) 40 I F 210 *Dechene v Montreal City* [1894] A C 640 P C) As to time generally see title TIME

(*f*) *Penny v Bruce* (1865) 18 C B (N S) 393 *Ferguson v Hyffe* (1841) 8 Cl & Fin 121 140 H T and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 228

(*g*) *Kreake v Cranefeldt* (1835) 3 My & Cr 499 *Boatwright v Boatwright* (1873) L R 17 Eq 71 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 253

(*h*) *Seagram v Knight* (1861) 9 Ch App 628 and as to a debtor executor see title EXECUTORS AND ADMINISTRATORS Vol XIV p 269

(*i*) See title BANKRUPTCY AND INSOLVENCY Vol II pp 60 202

(*k*) *Re Mansel, Ex parte Norton* (1892) 9 Morr 198 O A see *South Sea Co v Wymondsell* (1732) 3 P Wm 143 As to the effect of a winding up order on claims against a company see title COMPANIES Vol V p 309

(*a*) *Ford v Beech* (1648) 11 Q B 552 Lx Ch *Belshaw v Bush* (1831), 11

payment of a debt, the cause of action is suspended till dishonour (b), and an arrangement between a debtor and his creditors may be in such a form as to amount to an agreement that payment should be accepted in a particular way, and that in default the creditors should be remitted to the original cause of action, so that there is a fresh right of action upon the original debt when default is made, and time does not run till then (c). In equity a deed of arrangement between debtor and creditor, by which the creditor covenants not to sue the debtor while the trusts of the deed continue or until life interests have determined suspends the operation of the statutes during the specified time (d), but a mere letter of licence and contract not to sue for a specified time does not have that effect (e).

**SECT. 4.**  
**When Time**  
**begins to**  
**Run.**

Deed of  
arrangement.

**89** If a plaintiff brings an action and dies his personal representatives may within a year of probate of the will or of the grant of administration commence a fresh action and on the death of a defendant the plaintiff may commence a fresh action against his representatives within the same period although more than six years may then have elapsed from the accrual of the original cause of action (f).

Fresh pro-  
ceedings by  
and against  
representa-  
tives

C B 191 but see *Slater v Jones* (1813) 1 R 8 Lxch 186 192 *Reeves v Hearn* (1836) 1 M & W 323

(b) 2 Wms Saund (ed 1871) 301 n *Turney v Dodnell* (1874) 3 D & B 136 *Belshaw v Bush* (1851) 11 C B 191 205 *Re a Debtor Ex parte the Debtor* [1909] 1 K B 344 C A see *Iring v Vetch* (1837) 3 M & W 90 *Marreco v Richardson* [1908] 2 K B 584 C A

(c) *Iring v Vetch supra* *Re Stocl Ex parte Amos* (1896) 3 Mans 324 *M Donnell v Broderick* [1896] 2 I R 136 see *Lwards v Combe* (1812) 1 R 7 C P 519 *Re Hatton* (1812) 7 Ch App 723 and title BANKRUPTCY AND INSOLVENCY Vol II pp 334 337

(d) *O'Brien v Osborne* (1852) 10 Hare 92 *Ilen v Flwes* (1851) 3 Drew 25 see p 173 post

(e) *Fuller v Redman* (No 2) (1859) 26 Beav 614 619

(f) *Swindell v Bulkeley* (1886) 18 Q B D 250 C A *Kinsey v Heinwar* (1699) 1 Id Raym 432 *Willocks v Huggins* (1731) 2 Stra 907 *Hodden v Harridge* (1669) 2 Wms Saund (ed 1871) 150 173 *Curlews v Mernington* (Lord) (1851) 7 L & B 283 compare *Knight v Bate* (1718) 2 Cowp 738 *Adam v Bristol (Inhabitants)* (1834) 2 Ad & El 389 R S O Ord 17 r 2 see *Curtis v Sheffield* (1882) 20 Ch D 398 401 *Russell v Douding* (1884) 27 Ch D 231 *Muklethwaite v Varasour* (1893) 37 Sol Jo 386 These decisions are the effect of an equitable construction of the Limitation Act 1623 (23 Jac 1 c 16) s 4 by which if judgment in any action to which the Act applies was given for the plaintiff and it was reversed by error or a verdict passed for the plaintiff and upon matters alleged in arrest of judgment judgment was given against the plaintiff or if the defendant was outlawed and afterwards reversed his outlawry the plaintiff or his heirs executors or administrators might commence a new action within a year after the reversal of the judgment on the giving of judgment against the plaintiff on the reversal of the outlawry The procedure mentioned has now been abolished see R S C Ord 58 r 1 Civil Procedure Acts Repeal Act 1879 (42 & 43 Vict c 59) It is doubtful whether the provision above referred to has any application to the existing procedure or whether it should be applied to the entry of judgment for a defendant in the Court of Appeal see R S C Ord 40 rr 3, 5 as to an order carrying on proceedings, see title EXECUTORS AND ADMINISTRATORS, Vol XIV, p 228

## SECT 5

## SECT 5—Disabilities

## Disabilities

Infancy or  
lunacy of  
plaintiff

Absence of  
defendant  
beyond the  
seas

Return of  
defendant

**90** If a cause of action accrues to a person who is at the time of the accrual either under age or of unsound mind, the statute does not run until he is of age or of sound mind (*g*)

**91** If at the time when a cause of action accrues to a plaintiff the defendant is beyond the seas that is is out of the United Kingdom of Great Britain and Ireland or of the islands of Man Guernsey Jersey Alderney and Surt or any islands adjacent to any of them being part of the King's dominions (*h*) the statute does not run until the defendant returns from beyond the seas (*i*) This provision applies to the absence from the United Kingdom of a defendant who has never been there and to a foreigner as much as to a native of the United Kingdom (*l*) It also applies when the cause of action arises abroad although the remedy is barred in the country where the cause of action arose provided the liability is not extinguished by the law of that country (*l*)

If a defendant who is beyond the seas when the cause of action arises is afterwards in the United Kingdom for ever so short a time even without the plaintiff's knowledge time begins to run from the defendant's being there (*m*)

(*g*) Limitation Act 1623 (21 Jac 1 c 16) s 7 see *Reche v Hereman* (1729) 1 Barn (K B) 112 *Croier v Tomlinson* (166) 2 Mod 109 *et seq* *Itt v Rush* (1836) 4 Ad & El 912 and titles INFANTS AND CHILDREN Vol VII p 62 INFANTS AND PERSONS OF UNSOUND MIND pp 462 *et seq* *post* The Limitation Act 1623 (21 Jac 1 c 16) s 7 which was extended to actions for seamen's wages in the Admiralty Court (now the Probate Divorce and Admiralty Division of the High Court) by stat (1705) 4 & 5 Ann c 3 s 18 provided for three other disabilities of plaintiffs namely coverture imprisonment and absence beyond the seas As to coverture see *Richards v Richards* (1831) 2 B & Ad 44 *Scarpellari v Atcheson* (1845) 7 Q B 864 and see title HUSBAND AND WIFE Vol XVI p 329 note (*a*) Coverture has ceased to be a disability see *ibid* pp 91 *404 404* *Weldon v Neal* (1884) 51 I T 289 Imprisonment and absence of a plaintiff beyond the seas ceased to be disabilities for the purposes of the Limitation Act 1623 (21 Jac 1 c 16) and stat (1905) 4 & 5 Ann c 3 on the passing of the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 91) see *ibid* s 10 the provisions of which are retrospective (*Cornwall v Hudson* (1857) 8 F & B 429 *Lardo v Bingham* (1869) 4 Ch App 730) but as to imprisonment see Forfeiture Act 1810 (33 & 34 Vict c 13) s 8 and see note (*a*) p 53 *ante* The law as to the disabilities under the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 4 is the same as under the Limitation Act 1623 (21 Jac 1 c 16)

(*h*) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 7 Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) s 12 At common law beyond seas meant beyond the seas actually surrounding Great Britain Ireland was therefore at common law beyond the seas (*Anon* (1690) 1 Show 91 *per* HOLT C J *Jane v Bennett* (1836) 1 M & W 70) but Scotland was not (*Kilg v Walker* (1761) 1 Wm Bl 256) Compare the Army Act 1881 (44 & 45 Vict c 58) ss 145 (3) 190 (20)

(*i*) Stat (1705) 4 & 5 Ann c 3 s 19

(*k*) See *Strathorath v Gracme* (1770) 2 Wm Bl 723 *Lafond v Ruddock* (1853) 13 C B 813, *Pardo v Bingham* (1869), 4 Ch App 730 738 *Remmers v Druce* (1859) 23 Beav 140

(*l*) See *Williams v Jones* (1811) 13 East 439 and see *Finch v Finch* (1816) 45 L J (OH) 816, *Shelby v Guy* (1826) 11 Wheaton 361 371 notes to *Mostyn v Fabrigas* (1774) 1 Cowp 161 1 Smith I C 11th ed, 591, 634 *et seq* title CONFLICT OF LAWS Vol VI p 306

(*m*) *Gregory v Hurrell* (1826) 5 B & C 341

**92** If one co plaintiff is under a disability when the cause of action accrues and the other co plaintiff is not the statutory provisions relating to disabilities have, it seems no application and time runs from the accrual of the cause of action (*n*)

If one co debtor is beyond the seas at the time when the cause of action accrues against him and another co debtor is then within the seas time runs from the accrual of the cause of action against the latter and he may be sued during the absence of his co debtor (*o*) The absent co debtor may also be sued within the statutory period of his return (*o*) In the case of any cause of action in respect of contract, except one founded on debt the absence beyond the seas of one or more of several persons liable to be sued would it seems prevent an action being brought against those persons who are within the seas (*p*) If one of two co contractors is beyond the seas when the cause of action accrues against them and he dies beyond the seas the survivor may it seems, be sued within six years of such death (*q*)

SECT 5  
Disabilities.

Disability of  
co-plaintiff

Absence  
beyond the  
seas of  
co debtor

of co con  
tractors

**93** If a person entitled to a cause of action is under one disability when the cause of action accrues and this disability comes to an end but such person is then under another disability time will not begin to run till the second disability has ceased (*r*) If there is any interval between the determination of the first disability and the supervening of the second time will begin to run on the determination of the first disability, and the second disability would have no effect (*s*)

Successive  
disabilities.

If a person is under disability when the cause of action accrues to him and so continues up to his death his personal representatives have a right of action although the statutory period of limitation has elapsed during his lifetime (*a*) The right of the executor of such a person is it seems limited to six years from the death (*b*) It is conceived that if the person entitled to a cause of action dies intestate under disability time does not run until letters of administration have been granted (*c*)

Disability  
continuing  
till death

(*n*) *Perry v Jackson* (1792) 4 Term Rep 516 This decision relates to absence beyond the seas which is no longer a disability in this case but the reasoning is applicable to any kind of disability

(*o*) Mercantile Law Amendment Act 1866 (19 & 20 Vict c 97) s 11 see further title CONTRACT Vol VII p 460

(*p*) The Mercantile Law Amendment Act 1866 (19 & 20 Vict c 97) s 11 only applies to co debtors whereas in *ibid* s 14 the expression used is co contractors or co debtors

(*q*) *Twins v Mead* (1805) 16 C B 123 per JERVIS C J at pp 133 134

(*r*) *Supple s Lessee v Raymond* (1830) Hayes 6 (decided in Ireland under a corresponding section of an Irish Act (stat (1634) 10 Car 1 sess 2 c 6 s 13)) *Borrows v Ellison* (1871) L R 6 Exch 128 (decided in England under the corresponding section of the Real Property Limitation Act, 1833 (3 & 4 Will 4, c 27) s 16 (now repealed))

(*s*) *Borrows v Ellison supra*

(*a*) *Strithorst v Graeme* (1770) 2 Wm Bl 723 *Townsend v Deacon* (1849) 3 Exch 706

(*b*) *Townsend v Deacon supra per ROLFE B* at pp 711 712 see *Wych v East India Co* (1834) 3 P Wms 308

(*c*) See title EXECUTORS AND ADMINISTRATORS, Vol XIV p 230, and p 63 ante

## SECT 5

Executor of person dying under disability being under disability himself

Assuming that there is any limitation of time in the case of the executor of a person who dies under a disability, it seems that if all the executors are, or a sole executor is under disability when the testator dies, and administration is not taken out in the meantime but probate is granted when the disability is removed, time will not run until one of the executors or the sole executor ceases to be under disability (*d*)

If a person liable to an action remains beyond the seas from the time when the cause of action accrued until his death an action lies against his personal representatives although the statutory period may have elapsed in his lifetime and time will not begin to run till letters of administration have been taken out or the executor has proved or acted (*e*) If the executor is himself abroad at the time of his testator's death time will not begin to run until the executor has both returned home and either acted in England or proved (*e*)

Persons under disability may sue or be sued

94 The provision as to disability is a saving clause and of itself imposes no disability and a plaintiff to whom it applies may, while he is under a disability bring his action in the same way as if the statutory provisions as to such disability had not been passed whether the statutory period of limitation has elapsed or not and may also do so within the statutory period after the determination of the disability (*f*) The same construction is to be put on the provisions relating to the absence of defendants beyond the seas (*g*)

## SECT 6—Effect of Acknowledgments in Writing

## SUB SECT 1—In General

Acknowledgment of debt

95 A debt may be taken out of the operation of the Limitation Act 1623 (*h*) by an express unconditional promise to pay or by an unconditional acknowledgment of the debt from which a promise to pay is implied or by a promise to pay on the fulfilling of a condition or on the expiration of a specified time or the happening of a certain event if the condition is fulfilled or the specified time has elapsed or the specified event has happened (*i*) Time begins to run afresh from the making of such an unconditional promise or

(*d*) *Cotton's Case* (1590) 1 Leon 211 decided under the Statute of Fines (1488) 4 Hen 7 c 24 (now repealed) see *Dillon v Leman* (1795) 2 Hy Bl 584 *Doe d George v Jesson* (1805) 6 East 80 decided under the Limitation Act 1623 (21 Jac 1 c 16) s 2 (now repealed) is no authority on this point as the wording of that provision differs alike from that of the Limitation Act 1623 (21 Jac 1 c 16) s 7 and that of the Statute of Fines (1488) 4 Hen 7 c 24

(*e*) *Story v Iry* (1842), 1 Y & C Ch. Cas 603, *Flood v Patterson* (1861) 29 Beav 295

(*f*) *Forbes v Smith* (1855) 11 Exch 161

(*g*) In *Musurus Bey v Gadban* [1894] 1 Q B 533 affirmed [1894] 2 Q B 352, C A it was held that although it was possible to issue a writ for service out of the jurisdiction and to obtain leave to serve it or to give notice of it out of the jurisdiction yet the effect of stat (1705) 4 & 5 Ann c 16 s 19, remains the same and time does not run against the plaintiff while the defendant is beyond the seas As to service of process out of the jurisdiction see title CONFLICT OF LAWS Vol VI pp 181 291 PRACTICE AND PROCEDURE.

(*h*) 21 Jac 1 c 16

(*i*) *Lanner v Smart* (1827) 6 B & C 603

acknowledgment, or, in the case of a conditional or contingent promise, from the fulfilment of the condition or the lapse of the specified time, or the happening of the specified event. The promise express or implied is a new contract, the consideration for which is the old debt, and such a promise constitutes a new cause of action (*k*)

SECT 6  
Effect of  
Acknow-  
ledgments  
in Writing

An acknowledgment has the same effect whether made before or after the expiration of six years from the accrual of the original cause of action, provided it is made within six years of action brought (*l*)

Acknowledg-  
ment before  
action

An acknowledgment after action brought is of no effect in that action (*m*)

Acknowledg-  
ment after  
action  
Form

**96** The promise must be in writing signed by the party chargeable (*n*). If there are two or more joint contractors or executors or administrators of any contractor a written acknowledgment or promise made and signed by one or more will not affect the other or others who have not signed (*o*)

**97** If there is no date on a written acknowledgment, the date may it seems be supplied by parol evidence (*p*). The name of the creditor may it seems be supplied in the same way (*a*) and if it is not clear from the acknowledgment itself to what debt it refers, parol

Parol  
evidence of  
acknowledg-  
ment

(*l*) *Lanner v Smart* (1827) 6 B & C 603 *Mannell v Hedge* (1801) 2 I C I R. 88 *Hammund v Smith* (1864) 33 Beav 402. This is the result of the judicial construction of the Limitation Act 1673 (21 Jac 1 c 16) which contains no provisions as to acknowledgments. The provisions in the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 5 are only applicable to specialty debts *quære* whether as to any other debts governed by that Act an acknowledgment can have any effect see p 35 *ante*

(*l*) *Williams v Gun* (1810) Fortes Rep 117 150 *Spickenell v Hotham* (1804) Kay 669 *Willins v Smith* (1804) 4 D & B 180 *per COLFRIDGE J* at p 180. The observations of POLLOCK C B in *Cornforth v Smithard* (1809) 5 H & N 13 at p 14 and of BRAMWELL B S C *sub nom Cornforth v Smithurst* as reported 8 W R 8 to the contrary effect may now it seems be disregarded see *Scales v Jacob* (1826) 3 Bing 638 *per BEST CJ* at p 653 and *Haydon v Williams* (1830) 7 Bing 163 *per TINDAL CJ* at p 165 *Chasmore v Turner* (1800) L R 10 Q B 500 L & Ch

(*m*) *Lateman v Under* (1842) 3 Q B 514. The cases to the contrary effect (*Yea v Foulaker* (1700) 2 Burr 1099 *Thornton v Iltingworth* (1824) 2 B & C 824 *Rueler v Hannay* (1789) 4 Dist 604 n *Lloyd v Maund* (1758) 2 Term Rep 760) are earlier than *Lanner v Smart* *supra* and are not to be treated as authorities. If an acknowledgment is made after action brought the plaintiff may discontinue and commence a fresh action.

(*n*) Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) (commonly called Lord Tenterden's Act) s 1 and see title DEEDS AND OTHER INSTRUMENTS Vol X p 474. As to the effect of payment of principal or interest made by any person see p 67 *post*. As to acknowledgment by one of two or more contractors etc see p 61 *post*. The Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) contains no provision as to the nature or construction of the acknowledgment required but merely alters the mode of proof and leaves the nature and construction of an acknowledgment untouched (*Haydon v Williams* (1830) 7 Bing 163 *Moodie v Bannister* (1809) 4 Drew 432 440). For forms of acknowledgment suitable to various circumstances see *Encyclopædia of Forms and Precedents* Vol I pp 188 *et seq*

(*o*) Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 1 see p 61 *post*

(*p*) *Edmunds v Downes* (1834) 2 Cr & M 459 463 but see S C as reported 4 Tyr 173, 179 and see title EVIDENCE Vol XIII pp 518 *et seq*, compare title GUARANTEE Vol XV p 406

(*a*) See *Hurtley v Wharton* (1840) 11 Ad & El 934

**Section 4.**  
**Effect of**  
**Acknowledgments**  
**in Writing**

Acknowledgment need not be stamped as an agreement

evidence may be given to identify the debt (b) If a written acknowledgment is lost, parol evidence of its contents is admissible (c)

98 No acknowledgment nor other writing made necessary by the foregoing provisions (d) is to be deemed to be an agreement within the meaning of any statute relating to stamp duty (e) A written acknowledgment need not be stamped as an agreement if there is other evidence of the original debt (f) But a document which is put forward as an acknowledgment must be stamped with the stamp (if any) other than an agreement stamp, which from its form it is required to bear Thus a bill of exchange or promissory note not properly stamped cannot be put in evidence as an acknowledgment or as forming part of an acknowledgment along with another writing referring to it (g) A document in the form of a receipt without a stamp cannot be put in evidence to prove the payment of the money mentioned therein as received or any fact to be inferred from such payment but may be used to prove any other fact supported by the document which is independent of the question whether the payment was made or not (h)

Acknowledgment of liability other than debt has no effect.

99 It is only in the case of a debt that a promise to pay or an acknowledgment takes a liability out of the statute an acknowledgment of a liability in respect of a breach of contract other than a debt (i) or of a tort (j) will not in general have any such effect If upon a breach of contract there is no need for the assessment of damages but a definite sum can be recovered as liquidated damages by virtue of a stipulation between the parties a mere acknowledgment of the breach has it seems no effect but an acknowledgment of the stipulated sum being due takes the case out of the statute (k)

(b) *Spickernell v Hotham* (1804) Kay 669 *Bealey v Power* (1833) Hayes & Jo 368 *Whitcombe v St ere* (1903) 19 T L R 69, see *McGuffie v Burleigh* (1898) 18 L R 264 (two letters connected by parol evidence)

(c) *Haydon v Williams* (1830) 7 Bing 163 see *Read v Price* [1909] 2 K B 724 C A

(d) Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 1 see p 59 ante

(e) Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 8 see *Taylor v Steele* (1841) 16 M & W 660 *Heatley v Williams* (1806) 1 M & W 333 and title CONTRACT Vol VII p 538 As to stamp duties generally see title REVENUE

(f) *Morris v Dixon* (1836) 4 Ad & El 845

(g) *Jones v Ryder* (1838) 4 M & W 32 *Foster v Dawber* (1851) 6 Exch 839 *Parmister v Parmister* (1860) 1 John & H 135 *Evans v Prothero* (1800) 2 Mac & G 319 *Holmes v Mackrell* (1808) 3 C B (N S) 789 As to stamp duties on bills of exchange and promissory notes see title BILLS OF EXCHANGE PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS Vol II pp 570 et seq

(h) *Maiteson v Ross* (1849) 2 H L Cas 286

(i) *Boydell v Drummond* (1808), 2 Camp 157 see *Whitehead v Howard* (1800) 2 Brod & Bing 312

(j) *Hurst v Parker* (1817) 1 B & Ald 92 *Short v M'Carthy* (1820) 3 B & Ald 676 *Gibbons v M'Casland* (1818) 1 B & Ald 690 As to an acknowledgment with regard to actions under the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) see p 59 ant

(k) See *Whitehead v Howard* (1820), 2 Brod & Bing 372

## PART II—SIMPLE CONTRACT DEBTS AND PERSONAL ACTIONS

If an action is brought for an account in circumstances such that the plaintiff might have sued either in *assumpsit* or *trover*, and an account has been rendered by the defendant which would take the debt out of the statute if the plaintiff sued in *assumpsit*, but would have no effect if the plaintiff sued in *trover*, the defence of the statute is not good and the action should be treated as analogous to an action of *assumpsit* (l)

SECT 6  
Effect of  
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in Writing

As an acknowledgment or part payment operates to take a debt out of the statute by renewing the promise to pay or conferring a new cause of action it seems that if the creditor is under disability or the debtor beyond the seas at the time an acknowledgment or part payment is made time will not run until the disability has ceased or the debtor has returned within the seas (m)

Disability at  
time of  
acknowledgment made

### SUB SECT 2—By and to whom Acknowledgment must be Made

**100** An acknowledgment or promise in a writing signed by the duly authorised agent of the party chargeable has the same effect as if the writing had been signed by the party chargeable (n)

Acknowledgment  
by agent

If the signature of the agent is on the document containing the acknowledgment the position of the signature is immaterial so long as it verifies the whole acknowledgment (o) The question whether the agent had or had not authority to make the acknowledgment is a question of fact to be decided according to the particular circumstances of each case (p)

An acknowledgment of a debt by an executor if made in words from which if used by his testator a promise to pay would be implied is sufficient to take the debt out of the statute (q)

by executor

**101** The provision that no joint contractor, executor nor administrator is to be chargeable in respect of any written acknowledgment or promise signed by any other or others (r) does not lessen the effect of any payment of any principal or interest made by any person (s) If in an action against two or more such joint contractors executors or administrators it appears at the trial or otherwise that the plaintiff, though bailed as to one or more of such persons is entitled to recover against the

Co contractor

(l) See *Hony v Hony* (1814) 1 Sim & St 363 and as to such actions see title ACTIONS Vol I pp 36 *et seq* TROVER AND DETINUE

(m) See *Ilod v Pattison* (1861) 29 Beav 295 and compare p 56 *ante*

(n) Mercantile Law Amendment Act 1856 (19 & 20 Vict c 91) s 13 which applies to all acknowledgments made since the Act though the debt acknowledged was contracted before (*Archer v Leonard* (1863) 13 I Ch R 267 *Leland v Murphy* (1866) 16 I Ch R 300) and see title AGENCY Vol I p 207

(o) *Holmes v Mackrell* (1808) 3 C B (N s) 789 compare *Ingram v Little* (1883) 13 Q B 186

(p) See *Curwen v Milburn* (1889) 42 Ch D 424 *per* NORTH J

(q) See *Briggs v Wilson* (1804) 5 De G M & G 12 C A *Re Wolmershausen* *Wolmershausen v Wolmershausen* (1890) 62 I T 541 compare *Tulloch v Dunn* (1826) Ry & M 416 *Mulloch v Dawes* (1826) 9 Dow & Ry (K B) 40 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 202

(r) See p 59 *ante*

(s) See p 67 *post*



**SECT 6**  
**Effect of**  
**Acknowledgments**  
**in Writing**

Acknowledgment by one of several executors

other or others of the defendants by virtue of a new acknowledgment or promise or otherwise judgment may be given and costs allowed for the plaintiff, as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff (t)

In spite of this provision an acknowledgment of a debt made by one of several executors binds the testator's estate and after the death of the executor who makes such an acknowledgment an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving executors (u)

Trustees.

One executor may even it seems notwithstanding the dissent of his co executor give a valid acknowledgment of a statute barred debt of his testator, and thus bind the testator's estate, but one of two or more trustees has no power to bind the trust estate by such an acknowledgment (t)

Partners

As one of several partners is the agent of the others he can bind the firm by acknowledging a partnership debt (u)

Infants

**102** As an infant is capable of contracting a debt for necessities (x) he may make an acknowledgment of such a debt so as to take it out of the statute (y)

Acknowledgment must be to creditor or his agent

**103** A promise to pay or an acknowledgment of a debt must be made to the creditor or his agent (z) an acknowledgment made to a stranger (a) or not communicated to the creditor (b) is ineffectual, and although an admission of a debt by an administrator,

(t) Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 1 As to judgments generally see title JUDGMENTS AND ORDERS Vol XVIII pp 100 et seq

(u) *Re Macdonald Dick v Fraser* [1897] 2 Ch 181 and see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 202 203

(t) *Astbury v Astbury* [1898] 2 Ch 111 110 see further title EXECUTORS AND ADMINISTRATORS Vol XIV pp 202 note (f) 100

(w) *Irathwaite v Britain* (1836) 1 Keen 206 221 and see title PARTNERSHIP and p 73 post Acknowledgments made by a partner must be distinguished from acknowledgments made by one of several ordinary joint contractors

(x) See title INFANTS AND CHILDREN Vol XVII pp 63 et seq As to married women see p 72 post

(y) *Willins v Smith* (1854) 4 F & B 180

(z) *Edmonds v Goater* (1802) 10 Beav 410 *Clark v Hougham* (1823) 2 B & C 149

(a) *Grenfell v Girdlestone* (1831) 2 Y & C (ex) 662 676 *Moodie v Bannister* (1809) 4 Drew 432 *Godwin v Culley* (1809) 4 H & N 373 *Fuller v Redman* (No 2) (1809) 26 Beav 614 *Howcutt v Bonser* (1849) 3 Exch 491 000 *Stamford Spalding and Boston Banking Co v Smith* [1892] 1 Q. B 765 C A *Rugers v Quinn* (1889) 26 L R Ir 136 The cases to the contrary (*Richardson v Fen* (1771) Loft 86 *Mountstephen v Brooke* (1819) 3 B & Ald 141 *Halliday v Ward* (1811) 3 Camp 32) which are all before *Tanner v Smart* (1821) 6 B & C 603 and *Smith v Poole* (1841) 12 Sim 17 (see *Courtenay v Williams* (1844) 3 Hare 539 *Spollan v Magan* (1851) 11 O L R. 691 and *Re Ittles* (1847) 10 I Eq R 215 which are since *Tanner v Smart*, supra), are not to be treated as authorities

(b) *Bush v Martin* (1863) 2 H & C 311 *Re Severn and Wye and Severn Bridge Coal Co* [1896] W N 30 *Towndes v Garnett and Moseley Gold Mining Co of America* (1864) 33 L J (CH) 418

in a signed deposition or cross examination, is sufficient to take the debt out of the statute (c) an advertisement to creditors to bring in their claims (d) or an admission of a debt by a debtor in bankruptcy proceedings (e) or in the schedule to a composition or inspectorship deed, even if verified by his affidavit (f), has no such effect

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Effect of  
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SUB SECT 3—What Acknowledgments are Sufficient

**104** The construction of the document containing an acknowledgment is for the court alone, unless the document is connected with extrinsic evidence affecting its construction, when the construction is a question for the jury (g)

Construction  
of acknow-  
ledgment

**105** Any words are a sufficient acknowledgment if they either expressly or by implication amount to an unconditional acknowledgment of a debt or to a promise to pay (h) If the words used amount to such an acknowledgment or promise they are not qualified even if accompanied by a request for time (i) by expressions stating or implying that the debtor is unable to pay at present

What words  
are sufficient.

(c) *Re Leynon, Beynon v Beynon* [1813] W N 186 As to an executor including his debt in an affidavit for Inland Revenue see *Maniram v Seth Rupchand* (1906) 2 L I R 619 P C title EXECUTORS AND ADMINISTRATORS Vol XIV p 202

(d) *Scott v Jones* (1835) 4 Cl & Fin 392 H I (overruling *Andrews v Brown* (1714) Prec Ch 360) *Le Stephens Warburton v Stephens* (1859) 43 Ch D 39

(e) *M Donnell v Broderick* [1896] 2 I R 136 *Smallcombe v Bruges* (1874) M Cle 40 *Pott v Clegg* (1841) 16 M & W 321 *Re Clendinning Ex parte Anderson* (1859) 9 I Ch R 284 *Re Sollemache Ex parte Reall* (No 1) (1854) 13 Q B 11 20 C A and see title BANKRUPTCY AND INSOLVENCY Vol II pp 10 et seq

(f) See title BANKRUPTCY AND INSOLVENCY Vol II p 202 notes (d) (e) As to an acknowledgment by a person on the eve of bankruptcy see p 70 post

(g) *Routledge v Ramsay* (1839) 8 Ad & El 271 *Morrell v Frith* (1838) 3 M & W 402 *Collis v Sturt* (1857) 1 H & N 600 Previously to these cases there were decisions on this point to the contrary effect see *Lloyd v Maund* (1768) 2 Term Rep 760 *Kucler v Hannay* (1804) 4 East 604 n *Bird v Gammon* (1837) 3 Bing (N C) 883 *Frost v Bengough* (1821) 1 Bing 266 *Colledge v Horn* (1820) 3 Bing 119 while in other cases the point was considered as doubtful see *Dolson v Mahey* (1837) 8 Ad & El 225 n *Buck v Church* (1840) 9 C & P 209 *Insell v Benson* (1830) 2 Bing (N C) 241

(h) See *Edmonds v Goater* (1802) 17 Beav 410 *Bowdoin v Greenwood* (1811) L R 13 Eq 281 *Re Bentley Ex parte Wilson Ex parte Wyman* (1841) 1 Mont D & De G 556 *Waller v Lucy* (1840) 1 Scott (N R) 186 *Lobb v Stanley* (1844) 5 Q B 514 *Hart v Fendergast* (1840) 14 M & W 741 *Williams v Griffith* (1849) 3 Lxch 330 *Kolarts v Roberts* (1828) 1 Moo & P 487 *Brydges v Flumjtre* (1821) 9 Dow & Ry (K B) 746 *Bristol v Smith* (1813) 1 Cr & M 483 *Insell v Benson* (1835) 2 Bing (N C) 241 *Poynder v Bluck* (1837) 5 Dowl 570 *Collinson v Margesson* (1855) 27 L J (EX) 305 *Richardson v Barry* (1860) 29 Beav 22 *Cockrill v Sparkes* (1863) 1 H & C 699 *Cassidy v Firman* (1861) 1 I R C L 8 *Green v Humphreys* (1854) 26 Ch D 474 C A The leading case is *Tanner v Smart* (1827) 6 B & C 603 cited in notes (i) (k) (m) pp 58 59 ante which was decided before Lord Tenterden's Act (Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14)) but has remained an authority ever since The cases before *Tanner v Smart* supra which are inconsistent with it (see Darby and Bosinquet on the Statutes of Limitations 2nd ed., pp 66 67) are not to be regarded as authorities

(i) *Dodson v Markey* (1830) 8 Ad & El 220 n *Collis v Stark* (1807) 1 H & N 606 *Sydney v Hotham* (1811), Kay, 669 *Martin v Geoghegan* (1850) 13 I L R 40

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**Effect of**  
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but will pay in the future (j) or by an expression of hope to pay (k). But when there is no unconditional acknowledgment or promise, expressions of inability to pay at the present, or assurances on the part of the debtor, that he will do his best to pay, or hopes that he will in the future be able to pay may amount to a condition or qualification and prevent the implication of a promise (l).

A promise to pay a debt when proved (m) or when ascertained (n), or when the debtors affairs are arranged (o) is a sufficient acknowledgment and is not qualified by a condition.

**Conditional**  
**promise**

A conditional promise is a sufficient acknowledgment if there is proof that the condition has been fulfilled within six years of action brought (p).

**Words held**  
**insufficient**

**106** A request for an account or for details of the alleged debt, or an admission of an open account between the parties, is a sufficient

(j) *Dabbs v Humphries* (1834) 10 Bing 446 *Sykes v Hothorn* (1804) Kay 669 *Collis v Stack* (1801) 1 H & N 600 *Lee v Walnut* (1866) L R 1 Exch 364 *Tryple v Hill* (1899) 13 L J 738 *Walby v Ilgee* (1810) 1 R 10 C P 491 *Re Bushin Ex parte Laiten* (1894) 10 R 111 *Cooper v Kendall* [1909] 1 K B 400 C A but see *Tanner v Smart* (1821) 6 B & C 603 In *Tanner v Smart supra* the words used were "I cannot pay the debt at present but I will pay it as soon as I can" and no evidence was given that the debtor was able to pay it was held that there being no proof of ability to pay the acknowledgment was not sufficient. In *Cooper v Kendall supra* the words used were "I admit I owe Mr S C the sum of £210 0s but I cannot meet this liability at the moment although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan no evidence was given of ability to pay. It was held that there being first an unqualified acknowledgment of the debt the accompanying words were not sufficient to rebut the promise to pay implied in that acknowledgment. In *Cooper v Kendall supra* at p 409 *Tanner v Smart supra* was distinguished on the ground that there was no express admission of the debt in that case.

(k) *Sidwell v Mason* (1811) 2 H & N 306 per RAMWELL B at p 310 *Wilton v Steere* (1903) 19 T L R 611 *Larg v Malin* (1830) 4 C & P 463

(l) *Learn v Lewis* (1830) 6 Bing 319 *Murrell v Irth* (1838) 3 M & W 402 *Packham v Warrutt* (1806) 1 H & N 234 (an extreme case see *Sidwell v Mason supra* per POLLOCK CB at p 308) *Richardson v Barry* (1860) 29 Beav 27 *Moubray v Appleby* (1899) 60 L J 505

(m) *Holmes v Smith* (1801) 7 I C L R 461 *Ireland v Murphy* (1866) 16 I Ch R 500

(n) *Chelyn v Dally* (1840) 4 Y & C (Ex) 238 *Gardner v M Mahon* (1842) 3 Q B 561 *Archer v Leonard* (1833) 10 I Ch 1 261 *Nichols v Regent's Canal Co* (1894) 60 I J (Q B) 641 reversed on another point 71 L T 800 C A *Langrish v Watt* [1901] 1 K B 66 C A

(o) *Chasemore v Turner* (1810) 1 R 10 Q B 500 L R Ch

(j) *Humphreys v Jones* (1840) 14 M & W 1 *Lusk v Mitchell* (1871) 24 I L 272 *Mauvisell v Hedges* (1801) 2 I C L R 88 *Himmund v Smith* (1864) 33 Eav 452 *Lucleuch (Duke) v Fden* (1899) 61 L T 360 but see *Bird v Gammon* (1831) 3 Bing (N O) 883 *Cornforth v Smithard* (1859) 5 H & N 13 *Gould v Shirley* (1829) 2 Moo & P 581 *Haydon v Williams* (1830) 1 Bing 163 *Edmunds v Dwyers* (1834) 2 Cr & M 459 *Waters v Thunet (Earl)* (1842) 2 Q B 101 *Meyerhoff v Froelich* (1878) 3 O P D 333 *Jupp v Lowell* (1884) Cab & El 349 *Re Bethell Bethell v Bethell* (1881) 34 Ch D 561 *Lusher v Harsard* (1904) 20 T L R 563 C A *Cory v Bretton* (1830) 4 C & P 462 *Hodgens v Graham* (1831) Alc & N 49 *Kennett v Mubark* (1831) 8 Bing 38 *Buckmaster v Russell* (1861) 10 C B (N S) 45 *Re River Steamer Co Mit hel's Claim* (1871) 6 Ch App 822 *Jarrett & Son Ltd v Davies* (1904) 91 L T 736 *Fenner v Lord* (1898) 14 I L R 450 A promise to pay out of a particular fund or in a particular way is a conditional promise see p 66 post

## PART II — SIMPLE CONTRACT DEBTS AND PERSONAL ACTIONS

acknowledgment from which a promise to pay the amount found to be due may be inferred (q) But an agreement to take a particular item into account between the parties, without any statement as to how the account stands (r), or a mere expression of willingness to go into an account, the alleged debtor insisting that there is nothing due from him and that he is prepared to show this by the accounts (s), or a reference to a past application for an account (a), or an admission of a debt accompanied by a refusal to pay without an order of the court (b), is not a sufficient acknowledgment

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**107** A mere promise not to plead the statute, if made without any new consideration, and if unaccompanied by expressions which amount to an acknowledgment of the debt, but made in terms consistent with an intention to dispute the claim on other grounds is not a sufficient acknowledgment (v) If there is a new consideration for a promise not to plead the statute an action will lie for the breach of the promise, or the promise might be pleaded (d) as a good reply to a defence of the statute (e)

Promise not  
to plead the  
statute

**108** If some debt is acknowledged it is immaterial that the correctness of the amount claimed is disputed in the acknowledgment (f) The amount of the debt must be proved at the trial, or the damages will be merely nominal (g) A recital in a deed that the defendant was indebted to the plaintiff but that the amount was not ascertained and that the defendant was willing to pay the amount to be ascertained as therein mentioned, is an absolute promise to pay the amount proved at the trial to be due (h) If,

Amount of  
debt need not  
be expressed.

(g) *Rendell v Carpenter* (1828) 2 Y & J 494 *Prance v Simpson* (1854) Kay 678 *Swell v Mason* (1857) 2 H & N 306 *Godwin v Culley* (1859) 4 H & N 313 *Burrows v Baker* (1869) 3 I R Eq 96 *Quincey v Sharpe* (1876) 1 Ex D 72 *Sheet v Lindsay* (1877) 2 Ex D 314 *Barber v Berridge* (1881) 18 Ch D 204 *Curwen v Mulburn* (1889) 47 Ch D 424 *Langrish v Watts* [1903] 1 K B 636 C A *Maniam v Seth Rupchand* (1906) 22 1 L P 619 P O compare *Spog v Wright* (1842) 9 M & W 629

(r) *Hughes v Paramore* (1855) 7 De G M & G 229 C A see *Nash v Hill* (1808) 1 F & F 198

(s) *Crawford v Crawford* (1867) 2 I R Eq 166

(a) *Williams v Griffith* (1849) 3 Exch 330

(b) *Briggs v Wilson* (1854) 5 De G M & G 12 C A per TURNER L J at p 21

(c) See *East India Co v Odutchurn Paul* (1849) 7 Moo P C O 85 per Lord CAMPBELL CJ at p 112 *Gardner v M Mahon* (1842) 3 Q B 561 per WIGHTMAN J at p 568 see *Fuller v Redman* (No 2) (1859) 26 Beav 615 per ROMILLY MR at p 619 *Bewley v Power* (1833) Haynes & Jo 368

(d) Having regard to the Judicature Act 1873 (36 & 37 Vict c 66) s 24 As to pleading generally see title PLEADING and see title EQUITY Vol XIII pp 62 et seq

(e) See *Lade v Trill Trill v Lade* (1842) 6 Jur 272 and p 186 post

(f) *Haydon v Williams* (1830) 7 Bing 163 *Kennett v Milbank* (1831) 8 Bing 38 *Bewley v Power* supra *Courtenay v Williams* (1844) 3 Hare 539, *Richardson v Fen* (1771) Lofft 86 *Colledge v Horn* (1825) 3 Bing 119 *Rendell v Carpenter* supra *Lechmere v Fletcher* (1833) 1 Cl & M 623 *Bird v Gammon* (1837) 3 Bing (N C) 883 *Waller v Lacy* (1840) Scott N R 186, *Gardner v M Mahon* supra *Sidwell v Mason*, supra *Edwards and Godwin v Culley* (1859), 4 H & N 377, *Slidet v Lindsay*, supra.

(g) *Dickenson v Hatfield* (1831) 5 C & P 46

(h) *Okealy v Dalby* (1840) 4 Y & O (Ex) 238

SECT 6  
Effect of  
Acknowledgments  
in Writing

Solicitor's  
costs

Admission  
of account  
pending

Statement  
of accounts

Limited  
acknowledgment  
payment in  
particular

however, a definite sum smaller than the sum claimed is acknowledged to be due only the sum named is taken out of the statute (i) An undertaking to pay a solicitor any sum which may be found due to him for costs, when the same are taxed and certified takes the amount as settled by taxation out of the statute (k)

For the purpose of an action for an account, it is enough if there is an acknowledgment that an account is pending (l)

An acknowledged statement of accounts, where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment will not be allowed to support an action on an account stated in respect of items which are statute barred (m) If however there are items on both sides and a balance is struck the case is one of part payment (n)

**109** An acknowledgment coupled with an assertion that the debtor has a set off sufficient to countervail the debt is not sufficient (o) A submission to arbitration containing a promise to pay whatever shall be found due at such times and in such proportions as the arbitrators shall appoint is not available as an acknowledgment if the arbitration proves abortive unless the submission contains an unqualified acknowledgment of the debt (p) If the acknowledgment is only part of a general arrangement of accounts between the parties an unconditional promise to pay will not be inferred (q) If an acknowledgment points to payment only in a particular manner or out of a particular fund, a promise to pay in any other manner cannot be implied (r) Where, however, there are other expressions which alone would amount to an absolute promise a particular mode of payment may possibly

(i) *Dalby v Humphries* (1831) 10 Bing 446

(j) *Archer v Leonard* (1803) 15 I Ch R 261 see *Curwen v Mulburn* (1889) 4 Ch D 474 *Nichols v Regents Canal Co* (1894) 63 I J (Q B) 641 per CHARLES J (reversed on another point 11 L T 806 C A) As to the taxation of statute barred items see p 42 ante and as to taxation of costs generally see title SOLICITORS

(k) *Langrish v Watts* [1903] 2 K B 636 C A *Prance v Symson* (1804), Kay 618 compare *Friend v Loung* [1891] 2 Ch 471

(m) *Clark v Alexander* (1844) 8 Scott (N R) 141 *Ashby v James* (1843) 11 M & W 542 *He Drenan v Crawley* (1868) 16 W R 154 *Jones v Ryder* (1838) 4 M & W 32 *Nash v Hull* (1858) 11 L & F 198 The joint effect of these cases is it seems to overrule *Smith v Forty* (1829) 4 C & P 126 where the contrary was held (see also *Ashby v Ashby* (1829) 3 Moo & P 186 *Catling v Skoulding* (1790) 6 Term Rep 189) and as to account stated generally see title CONTRACT Vol VII pp 469 et seq

(n) See p 70 post

(o) *the Liver Steamer Co Mitchell's Claim* (1871) 6 Ch App 822 As to set off generally see title SET OFF AND COUNTERCLAIM

(p) *Hales v Stevenson* (1863) 8 I T 798 Ex Ch see *Fenner v Lord* (1898) 14 T 1 R 400

(q) *Cripps v Davis* (1843) 12 M & W 159 *Goate v Goate* (1856) 1 H & N 29 *Francis v Hawkesley* (1859) 1 E & E 1052

(r) *Whippy v Hillary* (1837) 3 B & Ad 399 *Martin v Knowles* (1833) 1 Nev & M (N B) 421 *Boultby v Ramsay* (1838) 8 Ad & El 221 *Cawley v Furnell* (1801) 20 L J (C P) 197 *Smith v Thorne* (1852) 18 Q B 134 *Courtenay v Williams* (1844) 3 Hare 339 550 *Re Littles* (1847) 10 I Eq R 275 *Buckmaster v Russell* (1861) 10 O B (N S) 745 *Philips v Philips* (1844) 3 Hare, 281

be so mentioned as merely to suggest a convenient arrangement and not to qualify the promise (s)

SECT 6  
Effect of  
Acknowledgments  
in Writing

## SECT 7—Part Payment and Payment of Interest

### SUB SECT 1—In General

**110** The effect of the Limitation Act 1623 (a) may be avoided not only by an acknowledgment in words but by part payment of principal or by payment of interest and the effect of such payments is saved from the operation of the Statute of Frauds Amendment Act 1828 (b) respecting acknowledgments in writing (c). The principle applies to payments of interest even though the debt does not properly carry interest (d). The principle is that any such payment is an acknowledgment of the existence of the debt from which is implied a promise to pay the residue or the principal as the case may be (e). The payment must however be such that from it a promise to pay can be inferred in fact and not merely implied in law (f). A promise to pay the principal cannot be inferred from the compulsory payment of interest under a judgment (g).

Part payment  
of principal  
or payment  
of interest

Promise to  
pay must be  
implied

**111** If there are any circumstances attending the payment which rebut the implication of a promise to pay as for instance a refusal to pay the remainder of the debt no effect can be given to the payment (h). The payment must be made first, on account of some debt, secondly on account of the debt sued for and thirdly as part only of what is due (i). Express declarations of the debtor at the time of the payment are conclusive but assertions made by him subsequently to the payment are not (k).

Circumstances must  
support  
implied  
promise

(a) *Gardner v M Mhlon* (1842) 3 Q B 561 *Lians v Simon* (1803) 9 Exch 282 As to the effect of an acknowledgment contained in a letter written without prejudice see title EVIDENCE Vol XIII p 558

(b) 21 Jac 1 c 16

(c) 9 Geo 4 c 14 s 1 see p 59 ante

(d) *Fordham v Wallis* (1852) 10 Hare 21, 225 The effect of such payments is the result of judicial decisions on the Limitation Act 1623 (21 Jac 1 c 16) but is recognised by the Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14). The provisions as to acknowledgment by part payment in the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 5 are only applicable to specialty debts see p 59 ante and p 79 post *quære* whether a part payment on account of a simple contract debt which is within the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 has any effect

(e) *Bamfield v Tupper* (1801) 7 L exch 27 see *Bealy v Greenslade* (1831) 2 Cr & J 61 *Re Rutherford Brown v Rutherford* (1850) 14 Ch D 687 O A per JAMES LJ at p 691

(f) *Morgan v Rowlands* (1817) L R 7 Q B 493 *Green v Humphreys* (1884) 26 Ch D 474 O A see *Re Boswell Merritt v Boswell* [1906] 2 Ch 359 per KEKEWICH J at p 363

(g) *Morgan v Rowlands* supra at p 498 *Green v Humphreys* supra *Lindsay v Maguire* [1899] 2 I R 554

(h) *Morgan v Rowlands* supra  
(i) *Wainman v Kyman* (1847) 1 Exch 118 *Davies v Edwards* (1801) 7 Exch 22 see *Foster v Dawber* (1801) 6 Exch 839

(j) *Toppets v Heane* (1834) 1 Cr M & R 252 *Holme v Green* (1816) 1 Stark 488 see *Burkitt v Blanchard* (1848) 3 Exch 89 *Linsell v Bonsor* (1835) 2 Bing (N C) 241

(k) *Baildon v Walton* (1841) 1 Exch 617, 633

**SECT 7**  
**Part Pay**  
**ment and**  
**Payment of**  
**Interest**  
 \_\_\_\_\_  
**Nature of the**  
**payment**

The nature of a payment may be inferred from the nature of similar payments made at other times (*l*), and, although the plaintiff must in all cases give some evidence that the payment relied on was made on account of some debt, the circumstances attending the payment, even without any direct evidence, may be such as to render it improbable that such payment could be made for any other purpose (*m*). When it is once established that the payment was made on account of some debt and that no other debt than the one sued for then existed the inference may be drawn that the payment was in respect of the debt sued for (*n*). If more debts than one are due and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made (*o*). If the debt sued for is ascertained, as on a promissory note and a payment smaller than the amount of the debt is made in respect of it it follows in the absence of any statement or circumstances leading to a different conclusion that the payment must have been made as part payment but if on the contrary, the amount of the debt is unascertained as upon a running account or for work and labour it does not follow that the payment was made as part payment in such case therefore there must be evidence that the payment was not intended as in full discharge (*p*).

**Payment of**  
**principal in**  
**regard to**  
**interest**

**112** As regards the payment of principal it is conceived that if a debt properly carries interest the principal and interest constitute one demand and therefore payment of principal or of part of it takes the interest also out of the statute unless the liability to pay interest is repudiated (*q*).

**Payment of**  
**interest**

**113** With respect to payment of interest if the payment is shown to have been made as interest (*r*) the only question that can in general arise is in respect of what debt it was made

(*l*) *Northall Jtn v Grimsditch* (1841) 7 Q. B. 419

(*m*) *Burn v Boulton* (1816) 2 C. B. 416

(*n*) *Evans v Davies* (1836) 4 Ad. & El. 840 see *Typle v Heane* (1834) 1 Cr. M. & R. 252

(*o*) *Re Rainforth Gwynn v Gwynn* (1879) 49 L. J. (OH) 5 O. A. As to appropriation of payments see p. 69 *post* title CONTRACT Vol. VII pp. 419-449 *et seq*

(*p*) *Burn v Boulton* (1816) 2 C. B. 416 *per* MAULE J. at p. 451 *Haugh v Cope* (1840) 6 M. & W. 524. Payment by a debtor to a creditor of a sum on account amounts to an acknowledgment by the debtor that there is an account between him and the creditor on which a balance of more than the sum paid would be payable (*Friend v Young* [1897] 2 Ch. 421 see also *Re Hale Lilley v Foad* [1899] 2 Ch. 107 O. A. *per* JINDREY MR. at p. 119)

(*q*) See *Collyer v Willock* (1827) 4 Bing. 313. There may be cases in which as against a particular defendant interest may be recoverable although the principal is not see title GUARANTEE Vol. XV p. 482 note (*d*) and *ibid* p. 551 note (*i*)

(*r*) It has been said that in cases of mortgages bonds and other securities where the principal carries interest but the interest does not the rule is that payments made are presumed to be paid in respect of interest before principal (*Bower v Marrs* (1841) Cr. & Ph. 301, 355 see *Thompson v Hudson* (1870) L. R. 10 Eq. 497) but this rule is not applicable in the case of interest due to bankers on an overdrawn account when according to the practice of bankers interest is from time to time converted into principal (*Parr v Bankeng Co v Yates*, [1898] 2 Q. B. 460)

When a breach of trust has been committed by improper investment on mortgage, payment by the trustees to the beneficiaries of the interest on the mortgage will not prevent the statute running in respect of their liability (s). Where there is one debt and one or more securities for it, if it is clearly shown that the subject matter is the same a payment of interest on the whole sum will, it seems, take the debt and all the securities out of the statute (t).

**SECT 7**  
**Part Pay-  
ment and  
Payment of  
Interest**

**114** With regard to payment whether of principal or of interest if more than one debt is shown to have been due at the time of the payment the payment is only effective if made on account of all the debts or if appropriated by the debtor to any one or more of the debts (a). This appropriation need not be proved by any express declaration of the debtor at the time of payment, but any expressions used by him either before or after that time or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all collectively will be sufficient for this purpose (b). In the absence of any evidence no inference can be drawn that the payment was made on account either of any particular debts or on account of all (c).

Appropriation

If at the time when the payment was made some of the debts were barred and some were not the payment can in the absence of any other evidence, be attributed only to those debts which were not barred (d).

Presumption  
that payment  
is of debt  
unbarred

If the debtor makes no appropriation at the time of payment the creditor may appropriate the payment to any of the debts (e) but such an appropriation cannot operate as a part payment so as to take a debt out of the statute (f). The rule that in the absence of appropriation by the debtor or the creditor a payment is presumed to be in discharge of the earliest of several debts (g) has no operation as regards the taking of such debt out of the statute (h).

(s) *Re Somerset Somerset v Poulett (Earl)* [1894] 1 Ch 231 C A see *J. Fountaine Pe Douler Fountaine v Amherst (Lord)* [1909] 2 Ch 382 C A  
*Sims v Brutton* (1850) 5 Exch 802

(t) *Dowling v Ford* (1843) 11 M & W 329. The defendant in this case was a surety as against whom payment by the principal debtor would not now be effective see p 73 post *Brandram v Wharton* (1818) 1 B & Ald 463 so far as it is inconsistent with *Dowling v Ford supra* must be considered overruled.

(a) *Rycombe Union Guardians v Eton Union Guardians* (1857) 1 H & N 687 *Re Rainforth Gwynn v Gwynn* (1879) 49 L J (CH) 5 C A

(b) *Waters v Tompkins* (1830) 2 Cr M & R 723 726 *Walker v Lutter* (1806) 6 E & B 506 *Bevan v Gething* (1842) 3 Q B 740 *Dixon v Holdroyd* (1861) 7 E & B 903 see *Re Rainforth Gwynn v Gwynn supra*

(c) *Burn v Bulton* (1816) 2 C B 476 per TINDAL C J at p 48.

(d) *Mills v Fowkes* (1839) 5 Bing (N S) 450 *Nash v Hodgson* (1855) 6 D C G M & G 474 C A *Re Boswell Merritt v Boswell* [1906] 2 Ch 359 366, compromised on appeal [1907] 2 Ch 331 C A

(e) See title CONTRACT Vol VII p 400 and p 41 ante

(f) See *Re Boswell Merritt v Boswell supra* *Re McHenry McDermott v Boyd* (1894) 71 L T 146 C A *Waller v Lacy* (1840) 1 Man & G 54 *Smith v Betty* [1903] 2 K B 317 C A, compare *Eyre v Coen* (1898) 3 J L T 59 and see title CONTRACT Vol VII pp 449—451

(g) See titles BANKERS AND BANKING Vol. I, p 586, CONTRACT Vol VII, p 450

(h) See cases cited in note (d) supra



## SMOKE 7

## Part Payment and Payment of Interest

Payment into court  
Payment under or on eve of bankruptcy

**115** Payment into court by a debtor in an action by the creditor is not sufficient to take the rest of the debt out of the statute it is equivalent to saying that the amount paid in is due and no more (i), it is also ineffectual for the same reason as an acknowledgment made after action brought (k)

A payment of a dividend on a debt made in a bankruptcy or under an inspectorship deed is not such a part payment as to imply a promise to pay the remainder (l) A payment on account of a debt made on the eve of the bankruptcy of the debtor is a good payment so as to revive the debt, if the debt has up to that time been treated by the parties as subsisting, but a payment at such a time on account of a debt which has been treated as dead and gone if made fraudulently with the object of giving the creditor a share of the debtor's estate in the bankruptcy will not avail to revive the debt as against the other creditors (m)

Mode of payment

**116** It is not necessary that the payment should be actually made in money for any arrangement between the parties intended to have the effect of discharging *pro tanto* the party indebted will have the same effect as a payment of money (n) The existence of such an agreement is a question of fact, and may be proved by implication or course of dealing or subsequent ratification as well as by express agreement (o) The delivery of goods to a creditor (p) or his agent (q) or the maintenance of the child of the creditor (which is in fact the supply of goods to the child on behalf of the father (r)) has been held sufficient Where there are debts due on both sides and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment to the amount of the smaller debt (a) But it is the striking of the balance that constitutes the payment not the mere existence or even statement in writing of cross demands (b)

Giving a bill or note

The acceptance by the debtor of a bill drawn upon him by a

(i) *Long v Greville* (1824) 3 B & C 10 *Reid v Dickson* (1833) 5 B & Ad 499

(k) See p 59 ante

(l) *Davies v Edwards* (1851) 7 Fxch 22 *Re Levey and Robson Ex parte Topping* (1865) 34 L J (BCY) 44 see *Taylor v Holland* [1902] 1 K B 676 per JELF J at p 680 and title BANKRUPTCY AND INSOLVENCY Vol II pp 202 284

(m) *Re Lane Ex parte Gaze* (1889) 23 Q B D 74 per CAVE J at p 77

(n) *Maber v Maber* (1867) L R 2 Exch 153

(o) See *Worthington v Grimsditch* (1845) 7 Q B 479 *Beamish v Whitney* [1908] 1 I R 38

(p) *Moore v Strong* (1835) 1 Bing (N C) 441 *Hooper v Stephens* (1835) 4 Ad & El 71 *Hart v Nash* (1835) 2 Cr M & R 337 *Collinson v Margeason* (1858) 27 I J (xx) 305

(q) *Iearse v Selby* (1842) 6 Jur 896

(r) *Bodger v Arch* (1854) 10 Exch 333 see *Doe d Roylance v Lightfoot* (1841) 8 M & W 553 560 *Amos v Smith* (1862) 1 H & C 238

(a) *Ashby v James* (1843) 11 M & W 542 *Re Hawkins Hawkins v Hawkins* (1849) 28 W R 240 as to the effect of a statement of account see p 66 ante

(b) *Williams v Griffiths* (1835) 2 Cr M & R 45, *Cottam v Partridge* (1842) 4 Man & G 271 *Clark v Alexander* (1844) 8 Scott (N R) 147 *Scholey v Walton* (1844) 12 M & W 510 see *Pott v Clegg* (1847) 16 M & W 321, 2 Wms Saund 186, *Stewart v Connick* (1871) 6 I R C L 562

creditor, or the delivery to the creditor of a bill drawn by the debtor on a third person on account of part of the debt, is also a sufficient part payment, whether the bill is paid at maturity or not but, even if it is paid, the promise implied from the part payment is deemed to be made at the time of the delivery of the bill and not when it is paid (c)

SECT 7  
Part Pay-  
ment and  
Payment of  
Interest

117 A parol acknowledgment by the debtor of a part payment is admissible in evidence (d) So also are entries made by a debtor of payment of interest (e) A memorandum of payment indorsed on a bill or note and signed by the debtor or a memorandum of payment in his handwriting is sufficient evidence of part payment (f) But no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing by or on behalf of the party to whom the payment is made is deemed sufficient proof of such payment (g) This does not prevent the application of the common principle of the law of evidence that entries of payment made by deceased persons before the statutory period has expired in account books or in any other way than upon the note or instrument creating the contract are admissible as declarations against interest (h)

Proof of  
payment  
Indorsement  
on bill.

Declaration  
of deceased  
person  
against  
interest

#### SUB SECT 2—By and to whom Effective Payment may be Made

118 Payment by an agent has the same effect as payment by the principal, but it is a question of fact whether the person making the payment was an agent for that purpose (i)

Payment  
by agent

(c) *Gowan v Forster* (1832) 3 B & Ad 507 *Irving v Veitch* (1837) 3 M & W 90 *Lurney v Didwell* (1804) 3 D & B 136 see *Spailes v Restal* (1856) 22 Beav 581 *Re Seaber Ex parte Peachy* (1836) 1 Deac 511 the effect is the same if a cheque is given on one day and not paid until a later day even though there is an agreement that the cheque should not be presented until the later date (*Marreco v Richardson* [1905] 2 K B 384 O A)

(d) *Care v Jones* (1801) 6 Exch 213 Lx Ch overruling *Willis v Newham* (1830) 3 Y & J 215 and the other cases inconsistent with *Cleave v Jones supra* see *Belan v Gething* (1842) 3 Q B 140 *Edwards v Jones* (1855) 1 K J 531 *Collinson v Margeseor* (1856) 21 I J (Ex) 305 *Mokey v Lurney* [1810] W N 82 As to admissions from the point of view of evidence see title EVIDENCE Vol XIII pp 456 et seq

(e) *Cleave v Jones supra* *Frentham v Deverill* (1837) 3 Bing (N C) 397 see *Re Mountaine Re Dowler Fountaine v Amherst* (Lord) [1909] 2 Ch 382 C A When interest on a debt due from a firm is calculated periodically in the books of the firm and carried to the capital account this is not evidence of payment but evidence that no payment has been made (*Jackson v Ogg* (1809) John 397)

(f) *Iurdon v Purdon* (1842) 10 M & W 562 *Lastwood v Saville* (1842) 9 M & W 615

(g) Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 3 *Bradley v James* (1803) 13 O B 822 Other writing in the above provision means a writing containing the contract by which the party is to be bound (*Bradley v James supra*) Before the Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) similar entries by a deceased payee on a note or bill made before the expiration of the statutory period were admissible (*Brigg v Wilson* (1854) 5 De G M & G 12 O A)

(h) *Bradley v James supra* see title EVIDENCE, Vol XIII p 561, see also *ibid* pp 463 et seq Such entries made after the expiration of the statutory period are not admissible, see *ibid* p 464 *Briggs v Wilson supra*

(i) *Rew v Pettit* (1834) 1 Ad & El 196 *Jones v Hughes* (1850), 5 Exch 104 see *Newbould v Smith* (1885) 29 Qb D 882 *Re Wolmershausen Wolmershausen*

**SECT 7**  
**Part Pay**  
**ment and**  
**Payment of**  
**Interest**

By receiver  
of mortgaged  
property

A receiver of mortgaged property appointed under the Conveyancing and Law of Property Act 1881 (l) is the agent of the mortgagor, and a payment by such receiver of the net rents of the property takes the mortgage debt out of the statute (l) but in the absence of express authority he has no power to make a part payment in respect of any other debts than those which he is by the statute directed to defray (m), and no part payment by him in respect of any such other debt would avail to take the rest of the debt out of the statute (n) nor is payment of the rents of mortgaged property by the tenant to the mortgagee in possession of itself sufficient to take the mortgage debt out of the statute (o)

By receiver  
in lunacy

Payments by a receiver in lunacy authorised to apply income for the maintenance of a lunatic, to guardians of the union who maintained the lunatic prevents a claim for arrears of maintenance being barred (p)

Payment by  
married  
woman

**119** A married woman may by part payment keep alive her debts in respect of her separate estate whether those debts were incurred before or after marriage (q) and also the liability of her husband for ante nuptial debts, provided he acquired property from or through her (r)

Payment to  
agent.

**120** The payment need not be made to the plaintiff in person but may be made to his agent (s) or by agreement between the parties to any person on the plaintiff's account. Such agreement may be proved by implication or course of dealing or subsequent ratification as well as by express and previous direction and it is a question of fact whether such agreement existed (t)

Payment to  
cestui que  
trust

**121** A *cestui que trust* is considered to be the agent of the trustee for the purpose of receiving payment (a). If trust money is lent to the

v *Holmershausen* (1890) 62 I T 541 *Thorne v Heard* [1893] 3 Ch 330  
*Harding v Edgcumbe* (1809) 28 I J (Ex) 313

(l) 44 & 45 Vict c 41 ss 19, 24 see title MORTGAGE

(l) *Berwick & Co v Price* [1905] 1 Ch 632, 612

(m) Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41) s 24

(n) See *Re Hale Lilley v Foad* [1899] 2 Ch 107 C A

(o) *Cockburn v Edwards* (1881) 18 Ch D 449 O A overruling the dictum of SHADWELL V C in *Brookhurst v Jessop* (1835) 7 Sim 435 *Harlock v Ashberry* (1882) 19 Ch D 539 O A see *Higley v Gull* [1906] 1 Ch 165 O A

(p) *Wandsworth Union v Northington* [1906] 1 K B 420 and as to such payments generally see title LUNATICS AND PERSONS OF UNSOUND MIND p 492 *post*

(q) Married Women's Property Act 1882 (45 & 46 Vict c 75) *Beck v Pierce* (1889) 23 Q B D 316, 322 C A

(r) Married Women's Property Act 1882 (45 & 46 Vict c 75) s 14. As to the liability of a husband for such debts see title HUSBAND AND WIFE Vol XVI pp 408—410 *Surman v Wharton* [1891] 1 Q B 491. Before 1880 a married woman was incapable of making a binding acknowledgment in regard to an ante nuptial debt (*Pittam v Foster* (1823) 1 B & C 248, *Neve v Hollands* (1802) 18 Q B 262)

(s) *Evans v Davies* (1836) 4 Ad & El 840

(t) *Worthington v Grimesditch* (1845) 7 Q B 479 *Edwards v Jones* (1855) 1 K & J 334 *Stamford Spalding and Boston Banking Co v Smith* [1892] 1 Q B 767, 770 C A see also *Hart v Stephens* (1845) 6 Q B 937 and title HUSBAND AND WIFE Vol XVI p 329 note (a)

(a) *Meggison v Harper* (1834) 2 Cr & M 322, see *Gleadow v Allen* (1833), 1 Cr & M 410, and title TRUSTS AND TRUSTEES

person who is entitled to receive the interest of the fund, he must be treated as having paid himself so as to prevent time running in his favour, while he is so entitled (b) But no such implication can arise, where a person covenants to transfer a sum of stock or to pay a sum of money to trustees on trust to pay the settlor the interest for his life and no stock is transferred nor money paid in such case the trust fund never comes into existence and the settlor cannot be supposed to have received the interest (c)

SECT 7  
Part Pay  
ment and  
Payment of  
Interest

**122** Part payment to a stranger is of no effect Thus where the maker of a promissory note which had been transferred by indorsement makes a payment to the original holder in ignorance of the indorsement the payment is of no avail in an action by the indorsees to take the debt out of the statute (d) But if a payment is made to a person who is wrongly believed by the paying debtor to act in a representative capacity as for example the administrator of an intestate the payment enures for the benefit of the estate supposed by the debtor to be represented by the payee (e)

Payment to  
stranger

**123** If there are two or more co contractors or co debtors, liable jointly only or jointly and severally or executors or administrators of any contractor no such co contractor or co debtor, executor or administrator is chargeable in respect of a debt by reason only of payment of any principal interest or other money (f) by any other or others of such co contractors or co debtors executors or administrators (g) A husband and wife are not co contractors in respect of an ante nuptial debt of the wife and therefore this provision does not apply to them (h)

Liability of  
joint con-  
tractors etc  
in respect of  
payment by

The above provision as to co debtors does not affect the rights and liabilities of the co contractors *inter se* thus if one of several co debtors makes a payment sufficient to take the debt out of the statute as against himself and pays the whole of the debt he can

Liabilities of  
co con-  
tractors  
*inter se*

(b) *Re Dixon Heynes v Dixon* [1899] 2 Ch 561 affirmed [1900] 2 Ch 561  
(c) A see *Re England Steward v England* [1895] 2 Ch 820 C A *Re Hawes*  
*Re Burchell Purchell v Hawes* (1892) 62 L J (CH) 463 *Topham v Booth*  
(1887) 35 Ch D 607 *Mills v Borthwick* (1865) 35 L J (CH) 31 *Re Leays s*  
*estate* (1869) 3 I R 1 q 659 *Burriell v Lqremont (Earl)* (1844) 7 Beav 205  
(c) *Spickernell v Hotham* (1804) Kay 669 610 see *Stone v Stone* (1869) 5  
Ch App 74

(d) *Stamford Spalding and Boston Banking Co v Smith* [1892] 1 Q B 765  
(e) A

(f) *Clark v Hooper* (1804) 10 Bing 480 *Bodger v Arch* (1804) 10 Exch  
333 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 147

(g) Other money refers to such things as notarial charges on a bill of  
exchange (*Gardner v Broole* [1897] 2 I R 6 per O'BRIEN J at p 13)

(g) Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) s 14 see  
p 81 *post* The provision applies it seems to payments made since the  
passing of the Act though the debt was contracted before see *Archer v*  
*Leonard* (1863) 15 1 Ch R 267 *Leland v Murphy* (1866) 16 I Ch R 500  
As to the meaning of the words by reason only of payment in the Mercantile  
Law Amendment Act 1856 (19 & 20 Vict c 97) s 14 see *Cockrill v Sparkes*  
(1863) 1 H & C 699 As to payments by one of several persons bound by  
several contracts see *Re Wolmershausen Wolmershausen v Wolmershausen* (1890)  
62 L T 541 As to acknowledgment by one of several executors being  
effectual to revive the debt as against the testator's estate see p 62, *ante*.

(h) *Beck v Pierce* (1889) 23 Q B D 316, 322, C A

**SECT 7**  
**Part Pay**  
**ment and**  
**Payment of**  
**Interest**

**Partners**

**Contractor**  
**becoming**  
**executor of**  
**deceased co**  
**contractor**

**Payment by**  
**executor**  
**heir or**  
**devisee**

recover from his co debtors their shares of the debt although the creditor's right against the co debtors is barred (*i*)

As long as a partnership exists, one partner in making payments on account of partnership debts may be presumed to do so as agent of the firm and therefore to bind the firm (*k*) But on the dissolution of partnership by death or otherwise the agency determines, and therefore no payments made after that time can in general affect any other party than the one who makes them (*l*) except in the case of a secret retirement (*m*)

If one co contractor becomes the executor of a deceased co contractor and makes payments in respect of a debt the capacity in which the payments are made is a question of fact *prima facie* such payments must be considered as made in the capacity of surviving co contractor and not of executor (*n*)

**124** Payment in respect of a debt by an executor keeps up the right of the creditor to compel legatees to refund (*o*) As regards the right (*p*) of a simple contract creditor to enforce payment out of the real estate of a deceased debtor payment by the heir or devisee will not bind the personal representative nor will payment by the latter if he has divested himself of such estate bind the heir or devisee (*q*) but if the executor is also beneficial devisee a payment by him binds both the personal estate and the land devised to him (*r*) A payment by the devisee of the real estate of a deceased debtor or of part of it in respect of a debt of his testator keeps the creditor's right alive as against all persons interested in the real estate (*s*) It seems that if the right of a simple contract creditor

(*i*) *Gardner v Broole* [189 ] 2 I R 6 and as to the right of contribution see title GUARANTEE Vol XV pp 530 *et seq*

(*k*) *Goodwin v Parton and Page* (1819) 41 I T 91 and see title PARTNER SHIP

(*l*) *Thompson v Walthman* (1806) 3 Dier 628 *Bristow v Miller* (1845) 11 I L R 461 *Watts v Woodman* (1810) L R 20 Eq 121 and see cases cit in note (*n*) *infra*

(*m*) *Re Tucker* *Tucker v Tucker* [1891] 3 Ch 429 C A

(*n*) *Atkins v Tredgold* (1823) 2 B & C 23 *Brantwaite v Britain* (1836) 1 Keen 206 221 *Scholey v Walton* (1844) 12 M & W 510 *Way v Bassett* (1845) 5 Hare 55 *Fordham v Wallis* (1803) 10 Hare 217 *Brown v Gordon* (1802) 16 Beav 30 *Thompson v Walthman supra* *Winter v Innes* (1838) 4 My & Cr 101 compare *Griffin v Ashty* (1840) 2 Car & Kir 139 *contra* the cases on this point before the Mercantile Law Amendment Act 1806 (19 & 20 Vict c 91) are still of importance because the effect of payments by a surviving co contractor the representative of a deceased co contractor seems to be the same since as before the Act

(*o*) *Fordham v Wallis supra* see p 104 *post*

(*p*) Under the Administration of Estates Act 1833 (3 & 4 Will 4 c 104) see title EXECUTORS AND ADMINISTRATORS Vol XIV p 246

(*q*) See title EXECUTORS AND ADMINISTRATORS Vol XIV p 203

(*r*) *Fordham v Wallis supra* *Intnam v Bates* (1826) 3 Russ 188

(*s*) *Re Hollingshead* *Hollingshead v Webster* (1888) 37 Ch D 651 *Re Chant* *Lord v Godfrey* [1905] 2 Ch 220 This point is not affected by the Statute of Frauds Amendment Act 1828 (9 Geo c 14) as to the effect of acknowledgments (see p 67 *ante*), or by the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) as to the effect of payments but see *Re Lacey Howard v Lacey* *foot*, [1907] 1 Ch 330 C A *per FARWELL J* at p 349 and p 79, *post*

against personality is kept alive by payment of interest by executors, the indirect right against the land by means of marshalling is also kept alive (i)

SECT 7  
Part Pay  
ment and  
Payment of  
Interest

SECT 8—*Actions of Tort by and against Personal Representatives*

**125** An action may be brought by the personal representatives of a deceased person for any injury, committed within six calendar months before his death to his real estate for which an action might have been maintained by him (u), but it is doubtful whether such an action can be brought for injuries to the chattels real of such a person committed during his life (x)

Actions by  
representatives  
Injuries to  
real estate

If a person who has obstructed the access of light to a house is sued for an injunction and for damages, and the plaintiff dies the plaintiff's executor cannot recover more damages than those that accrued within six months of the plaintiff's death (a)

Obstructing  
access of  
light

There are it seems no provisions as to disabilities which are applicable to such actions, and the periods of limitation fixed are absolute (b)

Disabilities

**126** The personal representatives of a deceased person may be sued within six calendar months after they have taken upon themselves the administration of the estate for any wrong done by the deceased to another in respect of his real or personal property if committed within six calendar months before the wrongdoer's death (c)

Action  
against  
representatives

If a person tortiously raises coal belonging to another and sells it more than six months before his death and continues to raise the coal within such six months, the injured party may sue the administrator of the offender in trespass for the acts committed within six months of the death and may also waive the tort and sue for money had and received in respect of the acts committed before that period (d)

Alternative  
remedy for  
wrongfully  
raising coal.

(i) But see *Kordham v Wallis* (1853) 10 Hare 217 *per* TURNER V C at p 230 As to marshalling see *Fusby v Seymour* (1844) 7 I Eq R 433 *Vickers v Oliver* (1842) 1 Y & O Ch Cas 211 and title EXECUTORS AND ADMINISTRATORS Vol XIV pp 291—293

(u) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 2 Apart from statute no action for injuries to the real estate of a deceased person could be brought see *Phillips v Homfray* (1883) 24 Ch D 439 463 O A and title EXECUTORS AND ADMINISTRATORS Vol XIV pp 227 *et seq* As to proceedings in respect of deceased's personality see *ibid* p 226

(x) *Adam v Bristol (Inhabitants)* (1834) 2 Ad & El 389 1 Williams on Executors 10th ed 610

(a) *Jones v Simes* (1890) 43 Ch D 607 613 *Jen's v Clifden (Viscount)* [1897] 1 Ch 694 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 227

(b) The Civil Procedure Act 1833 (3 & 4 Will 4, c 42) s 4 which provides for disabilities relates it seems only to the actions mentioned in *ibid*, s 3 see p 78 *post*

(c) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 2 *Re Williams Andrew v Williams* (1884) 52 L T 41 and see titles EXECUTORS AND ADMINISTRATORS Vol XIV pp 313 314, INJUNCTION Vol XVII, p 253

(d) *Powell v Rees* (1837) 7 Ad & El 428 The administrator in such case may sue for money received for the whole of the coal wrongfully gotten and by first suing in trespass by virtue of the statute he does not preclude himself

**SECT 8**  
**Actions of**  
**Tort by and**  
**against**  
**Personal**  
**Representa-**  
**tives**

Innkeeper's  
 negligence  
 Non repair

In accordance with the above rule actions can be brought against the personal representatives of an innkeeper for the negligence of the latter resulting in loss of property by a guest staying at an inn (e) or against the personal representatives of a tenant for life for non repair of premises which he was by the terms of the instrument creating the tenancy, expressly bound to repair (f)

## Part III—Specialties

### SECT 1—Periods of Limitation

Specialty  
 debts.

**127** The period of limitation for actions of debt upon an indenture of demise or for actions of covenant or debt upon any bond or other specialty, or for actions of debt or *scire facias* upon a recognisance, is twenty years after the accrual of the cause of such actions (g)

Meaning of  
 specialty

**128** The liability of a shareholder under a deed of settlement establishing a company, for his proportion of the losses of the company is a specialty (h) so also is the liability of a shareholder to pay calls under the Companies (Consolidation) Act 1908 (i) or of a company to pay dividends which have been declared (j) If one co debtor under a bond pays the whole of the debt, the liability of his co debtor to pay his share of the debt is not it seems in effect a specialty by virtue of the Mercantile Law Amendment Act 1856 (l) All actions grounded upon a statute

from afterwards suing in *assumpsit* independently of the statute in respect of the earlier acts

(e) *Morgan v Ravey* (1861) 6 H & N 260 see *Trilme v Adeane* (1873) 8 Ch App 756 760 and title INNS AND INNKEEPERS Vol XXVII pp 314 *et seq*

(f) *Woodhouse v Waller* (1880) 5 Q B D 404 and as to liability to repair see titles LANDLORD AND TENANT Vol XVIII pp 499 500 *et seq* SETTLEMENTS

(g) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 Before this Act there was no limitation in England for these actions but there was a presumption on the expiration of twenty years from the time when the cause of action accrued that the debts in respect of which such actions could be brought were paid unless any acknowledgment of the debt or any part payment or payment of interest had been made (see *Sutton v Sutton* (1882) 22 Ch D 511 O A 7er JESSEL MR at p 515) As to what is a specialty see titles ACTION Vol I pp 37 38 BONDS Vol III p 99 CONTRACT Vol VII p 332 As to recognisances see titles CRIMINAL LAW AND PROCEDURE Vol IX p 321 and *passim* and as to *scire facias* see title CROWN PRACTICE Vol A p 18

(h) *Helby v Stokes and Horsely's Cases* (1866) L R 2 Eq 167

(i) 8 Edw 7 c 69 see *ibid* ss 14(2) 120 *Duck v Robson* (1870) L R 10 Eq 629 *Peninsular Co v Fleming* (1872) 21 I F 93 and title COMPANIES Vol V pp 164 423

(k) *Smith v Cork and Brandon Rail Co* (1870) 5 I R Eq 65 *Re Drogheda Steam Packet Co* [1903] 1 I R 512 *Re Artisans' Land and Mortgage Corporation* [1904] 1 Ch 796 title COMPANIES Vol V pp 276 724 note (d)

(l) 19 & 20 Vict c 97 s 5 *Re Cochran's Estate De Wolf v Lindell* (1868) L R 5 Eq 209 see title GUARANTEE Vol XV p 511 note (o) and *Copps v Middleton* (1820) Turn & R 224 (a case before the Act)

or charter which are not within the Limitation Act, 1623 (*m*), are actions on a specialty (*n*)

SECT 1  
Periods of  
Limitation

Actions  
within two  
Acts

**129** Some actions are within the words both of the Civil Procedure Act, 1833 (*o*), s 3 and of the Real Property Limitation Act, 1874 (*p*) s 8 (*q*). To this class belong actions for the recovery of a sum of money charged on land and also secured by a covenant or other specialty and actions to enforce judgments. In such cases the latter provision (*p*) applies instead of the former (*o*) and the period of limitation is twelve years (*q*).

Some actions are within the words both of the Civil Procedure Act 1833 (*o*) s 3 and the Real Property Limitation Act, 1874 (*p*) s 1. To this class belong actions for a rentcharge or rent as an inheritance which is also secured by a covenant, in these cases the period of limitation is twelve years even if the action is brought on the specialty (*r*).

Other actions are within the words both of the Civil Procedure Act, 1833 (*o*) s 3 and of the Real Property Limitation Act 1833 (*s*), s 42. To this class belong actions for the recovery of arrears of rent or of interest charged upon or payable out of any land or rent and also secured by a covenant or other specialty. In such cases the provisions of the Civil Procedure Act 1833 (*o*) s 3 apply if an action is brought on the specialty, and the period of limitation is twenty years (*t*).

#### SECT 2—When Time begins to Run

**130** The point from which time limited by the Civil Procedure Act 1833 (*o*) s 3 is to be calculated is the accrual of the cause of action (*u*). Thus in the case of a covenant or bond the time runs not from the date of the instrument but from the breach of the covenant or of the condition of the bond (*v*). If a surety covenants jointly with a mortgagor and also separately to pay the mortgage debt with interest on demand, in the case of the principal debtor

Time runs  
from accrual  
of cause of  
action  
Breach of  
covenant  
Surety

(*m*) 21 Jac 1 c 16 see p 40 *ante*

(*n*) *Cork and Bandon Rail Co v Goode* (1853) 13 O B 826 830. An action by an officer of the Goldsmiths Company under the Gold and Silver Wares Act 1844 (7 & 8 Vict c 22) s 3 to recover penalties is it seems either an action on a statute and so within the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 (see p 174 *post*) (*Robinson v Gurrey* (1851) 7 Q B D 465 O A *per LUSH J* at p 475) or is not within any Statute of Limitations (*ibid per BRAMWELL LJ* at p 472) see p 175 *post*. As to actions by or against the Crown see p 175 *post* as to actions on penal statutes see p 174 *post* as to actions founded on an equitable right see p 169 *post*. As to actions on an instrument executed in a country where there is no distinction between specialty and simple contract see title CONFLICT OF LAWS Vol VI p 308.

(*o*) 3 & 4 Will 4 c 42

(*p*) 37 & 38 Vict c 57

(*q*) See p 82 *post*

(*r*) *Shaw v Crompton* [1910] 2 K B 370

(*s*) 3 & 4 Will 4, c 27 see p 104 *post*

(*t*) *Paget v Foley* (1836) 2 Bing (N S) 679 see p 97 *post*

(*u*) See the cases decided under the Limitation Act 1623 (21 Jac 1, c 16), cited p 42 *ante*

(*v*) *Tuckey v Hawkins* (1847) 4 O B 655, *Barber v Shore's Heir and Tenants* (1839) 1 Jebb & S 610 *Galman v Chute* (1847) 11 I L R 442 *Kennedy v Whaley* (1848) 12 L L R 54 and see title BONDS Vol III, p 100



|   |   |
|---|---|
| <b>SECT 2</b><br><b>When Time begins to Run</b> | no demand is necessary and the time begins to run in his favour at once but in the case of the surety time does not run in his favour until demand has been made (u) If the breach is a continuing one, a fresh cause of action arises at every moment of time during which the breach continues (x) and therefore where a tenant covenants to keep the demised premises in repair and neglects to do so time does not run so long as they continue out of repair during the tenancy even though they are entirely destroyed (y) Where however on the sale of property the vendor covenants that he has a good title to transfer while in fact he has not a good title the breach of the covenant is at the time of the sale and there is no continuing breach but if the vendor covenants for quiet enjoyment there is no breach of that covenant till there is an interference with the enjoyment of the purchaser or those claiming through him (z) If the transferees of shares in a company are under the company's deed of settlement released from all liabilities in respect of the shares after the transfer time begins to run in respect of such liabilities from the date of the transfer (a) |
| Continuing breach                               |   |
| Covenant for title                              |   |
| Liability of transferees of shares              |   |
| Death of plaintiff or defendant                 | <b>131</b> On the death of a plaintiff or defendant a fresh action may be commenced by or against as the case may be the representatives of the deceased within a year from probate of his will or grant of administration (b)  |

### SECT 3 — Disabilities

|                          |  |
|--------------------------|--|
| Disability of plaintiff  | <b>132</b> If any person entitled to any of the actions mentioned in the (Civil Procedure Act 1833 (c) s 3 or to a <i>scire facias</i> upon a recognition is at the time when the cause of action accrued under age or <i>non compos mentis</i> the statute does not begin to run until such person is of full age or of sound mind (d) If any person against whom there is any such cause of action is at the time of the |
| Absence beyond the seas. |  |

(u) *Re Irons's (J) Estate Brown v Brown* [1895] 2 Ch 300 and see title GUARANTEE Vol XV p 488

(v) *Maddock v Mallet* (1860) 12 I C I R 143 193 Ex Ch *Spoor v Green* (1874) L R 9 Exch 99 As to the cause of action arising on successive breaches of a bond or covenant to secure *eg* an annuity not charged on land see *Manning v Phelps* (1854) 10 Exch 59 title BONDS Vol III p 100 As to annuities charged on land see p 115 *post*

(y) *Maddock v Mallet supra Morrough v Alleyne* (1813) 7 I R Eq 461

(z) *Spoor v Green supra Turner v Moon* [1901] 2 Ch 825 828 see title STATE OF LAND and compare title LANDLORD AND TENANT Vol XVIII p 527

(a) *Helby's Stokes and Horsey's Cases* (1866) L R 2 Eq 167

(b) *Sturges v Darell* (1860) 6 H & N 120 Ex Ch this is the effect of the equitable construction of the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 6 the provisions of which are similar to those of the Limitation Act 1623 (21 Jac 1 c 16) s 4 see note (f) p 55 *ante*

(c) 3 & 4 Will 4 c 42

(d) *Ibid* s 4 which originally provided for two other disabilities of plaintiffs—coverture and absence beyond the seas As to coverture see Married Women's Property Act 1882 (45 & 46 Vict c 75) ss 1(2) 25 and p 56 *ante* As to absence of a plaintiff beyond the seas see Mercantile Law Amendment Act, 1856 (19 & 20 Vict c 97) s 10 and p 56 *ante* The cases as to disabilities decided under the Limitation Act 1623 (21 Jac 1 c 16) (see p 56 *ante*) would seem to be applicable to disabilities under the above provision As to the effect of acknowledgment in case of disability see p 81, *post*

accrual of the cause of action beyond the seas (e) the statute does not run against the person entitled to bring the action until the person liable to be sued returns from beyond the seas (f)

SECT 3  
Disabilities  
—

SECT 4 — *Effect of Acknowledgment*

**133** If any acknowledgment is made by writing signed by the party liable by virtue of an indenture of demic specialty or recognisance or by part payment or part satisfaction on account of any principal or interest then due thereon the creditor may bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after acknowledgment (g)

Acknowledgment in writing or by payment

But an acknowledgment can only be effective where the sum to be recovered is a definite sum and cannot be effective where the claim is for unliquidated damages (h) nor is every payment of principal necessarily an acknowledgment that more is due (i)

**134** The acknowledgment must be made by the party liable or his agent this includes not only any person who is liable under the specialty but also any persons who can be called upon to pay the debt (k)

By whom acknowledgment must be made

An acknowledgment by an agent is on the same footing with one by the party liable (l) If a mortgagor assigns the equity of redemption and the assignee pays interest on the mortgage the assignee is an agent of the mortgagor for this purpose (m)

Acknowledgment by agent

An acknowledgment by payment must like an acknowledgment in writing be made by the party liable or his agent (n) If in a suit for partnership accounts a receiver is appointed and makes payments to one of the partners on account of a debt due to them from another of the partners under a covenant in a partnership deed the payments not being authorised by the terms of the receiver's appointment and not proved to be sanctioned by the partner who owes the debt the receiver is not the agent of the latter for the purpose of making the payments (o)

Acknowledgment by payment

(e) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 7 see pp 56 61 *ante*

(f) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 4

(g) *Ibid* s 5 As to the effect of disabilities see p 81 *post* For a form of acknowledgment see *Encyclopædia of Forms and Precedents* Vol I p 186

(h) *Blair v Ormond* (1851) 17 Q B 434 436 and see p 60 *ante*

(i) *Ashlin v Lee* (1875) 44 L J (CH) 174 316 C A The rules for determining whether a payment has that effect and also on account of what debt it is made are the same as those that govern actions which are within the Limitation Act 1623 (21 Jac 1 c 16) see p 61 *ante*

(k) *Re Lacey Howard v Lightfoot* [1907] 1 Ch 330 C A *per* BUCKLEY L J at p 352 A person who as devisee or heir is liable to be sued for the debt of a testator (see title EXECUTORS AND ADMINISTRATORS Vol XIV p 252) is a person liable within the meaning of the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 7 although he is not personally liable see *Re Lacey Howard v Lightfoot supra* at pp 345 352 compare *Re England Steward v England* [1895] 2 Ch 520 C A

(l) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 7

(m) *Forsyth v Bristowe* (1853) 8 Exch 716 see *Dobb v Waller* [1893] 2 Ch 429 *Bradshaw v Widdrington* [1902] 2 Ch 430 C A

(n) *Forsyth v Bristowe supra* *Roddam v Morley* (1857) 1 De G & J 1 6 *Coope v Creswell* (1866) 2 Ch App 112 124 *Dobb v Walker supra* at p 43 *Re England Steward v England supra*

(o) *Whitley v Lowe* (1858) 26 Beav 421 *Quære* whether the result would

## SECT 4

**Effect of Acknowledgment**

To whom an acknowledgment may be made

**135** An acknowledgment in writing in order to be sufficient to take a debt out of the statute (*p*) need not amount to a promise (*q*) Any admission even if not made to the creditor or his agent is sufficient (*r*) thus an admission of an executor in administration proceedings instituted by a residuary legatee that a debt is due to a creditor (*s*) and, it seems, an admission made by a bankrupt in his statement of accounts or in his examination, if the bankruptcy were annulled (*t*) would be sufficient

An acknowledgment by payment must it seems from the very nature of payment be to the person entitled or his agent (*u*)

An acknowledgment of a mortgage debt charged on land made after the mortgagee's right against the land has been barred has no effect in reviving the mortgagee's remedy on the covenant in the mortgage deed (*v*)

## Proof

The ordinary rules of evidence apply to the manner of proving an acknowledgment (*w*)

Indorsement or memorandum of payment

The question whether an indorsement or memorandum of payment made by the payee on a bond or other specialty is admissible as evidence of payment depends upon the ordinary rules of evidence (*a*) If made before the period of limitation has elapsed it is an entry against the interest of the person making it and is therefore admissible in evidence after his death though its effect then is in favour of his representatives If made after the lapse of the period of limitation it is an entry in his own favour, and

have been different if the receiver had been authorised by the court compare *Le Hale Jolley v Load* [1899] 2 Ch 101 C A and see p 14 *ante*

(*p*) Civil Procedure Act 1833 (3 & 4 Will 4 c 42)

(*q*) *Moodie v Bannister* (1859) 4 Drew 432 see *Houcutt v Bonser* (1849) 3 Exch 491 *Foryth v Bristowe* (1853) 5 Exch 716 The law is otherwise in the case of the Limitation Act 1623 (21 Jac 1 c 16) see p 63 *ante* In cases under the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) an acknowledgment or part payment cannot operate as a new promise for a promise by specialty cannot be supported by a promise not by specialty or by any implication of a promise from a payment on account and its real effect is to give a further time during which the action on the specialty can be brought

(*r*) The Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 5 differs from the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 (see p 103 *post*) and the Real Property Limitation Act 1844 (37 & 38 Vict c 51) s 8 (see p 92 *post*) in that it contains no provision as to the person to whom the acknowledgment is to be made whereas the two last mentioned enactments provide that the acknowledgment is to be given to the person entitled to the payment or his agent

(*s*) *Moodie v Bannister supra* see *Read v Price* [1909] 1 K B 577 583 affirmed [1909] 2 K B 724 C A and compare p 62 *ante*

(*t*) Compare p 63 *ante* and as to the effect of admissions in bankruptcy on the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 see p 93 *post*

(*u*) *Re Lacey Howard v Lightfoot* [1907] 1 Ch 330 341 C A see p 72 *ante*

(*v*) *Beamish v Whitney* [1909] 1 F R 360 but see *Waters v Lloyd* [1911] 1 F R 153 As to the effect of payment of interest or part payment of principal by the mortgagor in preserving the mortgagee's right against the land see p 146 *post*

(*w*) See *Read v Price*, [1909] 2 K B 724 C A and see title EVIDENCE Vol XIII pp 518 *et seq*

(*a*) Lord Tenterden's Act (Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14), s 3 (see p 71 *ante*)) has no application to debts governed by the Civil Procedure Act, 1833 (3 & 4 Will 4 c 42)

therefore, not admissible (b) If it bears no date the date may be proved *abunde* (c)

SECT 4  
Effect of  
Acknow-  
ledgment

**136** An acknowledgment in writing by one of several persons liable, whether jointly or successively, takes a debt out of the statute as regards the person who makes the acknowledgment and also as regards the other persons liable jointly or successively (d)

Acknowledgments by joint obligors  
Part payment by joint obligors

In the case, however of two or more co contractors or co debtors, liable jointly only or jointly and severally or of the executors or administrators of any contractor a payment by one of such persons does not take the case out of the statute as against the others (e) When several are at the same time jointly interested in the real estate of a debtor a payment by a devisee of part of such estate will not keep the debt out of the statute as against a devisee of another part except in cases where the debt is charged on land (f) But the case is different with persons who are successively liable a payment therefore by a tenant for life of the real estate of a specialty debtor takes the debt out of the statute as against the devisee in remainder (g)

Successive liability

**137** If a person entitled to bring an action is under age or of unsound mind at the time when the person liable makes an

Disability of person entitled to action

(b) See p 71 *ante* *Scarle v Barnington* (Lord) (1731) 2 Stra 826 H L *Gleadow v Athin* (1833) 1 Cr & M 410 421 *Jurner v Crisp* (1740) 2 Stra 827 *Smith v Battens* (1834) 1 Mood & R. 341 and see title EVIDENCE Vol XIII pp 464 461

(c) *Briggs v Wilson* (1804) 5 De G M & G 12 20 O A *Quere* whether if it bears a date that fact is evidence without other proof that it was made at that date see 1 Taylor Law of Evidence 10th ed 491 see *Briggs v Wilson supra* *Glynn v Bank of England* (1750) 2 Ves Sen 38 *Rose v Bryant* (1809) 2 Camp 321 *Gale v Capern* (1834) 1 Ad & El 102 *Smith v Battens* (1834) 1 Mood & R 341 *Newbould v Smith* (1880) 29 Ch D 882 and compare p 59 *ante* See also title CONTRACT Vol VII p 526

(d) *Roddam v Morley* (1857) 1 De G & J 1 *Read v Price* [1909] 2 K B 24 732 O A affirming S C [1909] 1 K B 577 compare p 13 *ante* The decisions to the contrary effect (*Duckenson v Leasdale* (1862) 1 De G J & Sm 62 *Coope v Cresswell* (1866) 2 Ch App 112) have been frequently dissented from and are now not to be regarded as authorities see *Read v Price supra* *Dibb v Waller* [1893] 2 Ch 429 In *Read v Price* [1909] 1 K B 571 CHANNELL J held that an executor of one of several joint obligors did not become jointly liable with the surviving obligors and that an acknowledgment by him though affecting his testator's estate had no effect on their liability but no opinion was expressed on this point by the Court of Appeal and see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 252 253 308

(e) Mercantile Law Amendment Act 1876 (19 & 20 Vict c 91) s 14 *Read v Price supra*

(f) See *Re Lacey Howard v Lightfoot* [1907] 1 Ch 330 O A *per* FARWELL LJ at p 349 The Mercantile Law Amendment Act 1876 (19 & 20 Vict c 97) s 14 (see p 73 *ante*) does not apply to the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 (see p 92 *post*) It seems that in the case of money charged on land a payment by a devisee of part of an estate will preserve the right of the creditor to resort to land not charged (*Re Lacey Howard v Lightfoot supra*) see *Re Chant Bird v Godfrey* [1906] 2 Ch 225 *Pears v Lang* (1871) L R 12 Eq 41 *Dibb v Walker* [1893] 2 Ch 429 *Leahy v De Moleyns* [1896] 11 E R 206 and p 74 *ante* As to devisees of land in general see title WILLS

(g) See *Re Lacey Howard v Lightfoot supra* at p 349 *Roddam v Morley supra*, *Re Hollingshead Hollingshead v Webster* (1888) 37 Ch D 651 657

**SECT 4**  
**Effect of**  
**Acknowledgment**

Absence of  
person liable

acknowledgment by writing or payment, or if the person who makes the acknowledgment is at the time of making it beyond the seas the statute does not run until the person entitled has ceased to be under disability, or the person who makes the acknowledgment has returned from beyond the seas (*h*) If the person entitled dies under disability or the person liable makes an acknowledgment abroad and dies without returning the same rules apply as in like cases under the Limitation Act 1623 (*i*)

## Part IV — Money Charged upon or Payable out of Land or Rent, or Secured by a Judgment, and Legacies, and Personal Estate of Intestates

### SECT 1 — *Principal Moneys*

#### SUB SECT 1 — *Money Charged on Land or Rent*

Period of  
limitation

**138** An action or other proceeding whether founded on a legal or equitable right (*h*), to recover any sum of money secured by any lien or mortgage or otherwise charged upon or payable out of land or rent must be brought within twelve years next after a present right to receive the same has accrued to some person capable of giving a discharge (*l*)

(*h*) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 5 As to disabilities and absence beyond the seas see p 56 *ante*

(*i*) 21 Jac 1 c 16 see p 57 *ante* As to the absence of one of several joint debtors beyond the seas at the time of an acknowledgment see *Roddam v Morley* (1837) 1 De G & J 1 the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) s 11 and p 57 *ante*

(*k*) The Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 relates to any action or suit or other proceeding at law or in equity The words at law or in equity are out of place in the section as they follow charged upon or payable out of any land or rent but they are to be read as if they followed the words no action or other proceeding shall be brought see *Sutton v Sutton* (1882) 22 Ch D 511 516 C A The word suit refers to proceedings in equity all such proceedings are now called actions (see the Judicature Act 1873 (36 & 37 Vict c 66) s 100) a term which formerly was only used of proceedings in the courts of common law see title ACTION Vol I p 3

(*l*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 As to acknowledgments see p 92 *post* The Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 has taken the place of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 40 which is repealed (see Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 9) and has substituted a period of limitation of twelve years for twenty but in other respects the sections are identical in form *Mutatis mutandis* decisions under the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 40, are applicable to the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 Before the passing of the Real Property Limitation Act, 1833 (3 & 4 Will 4 c 27) there was no limit of time to the recovery of the money charged, so far as it was claimed out of the land. The fact of

SECT 1  
Principal  
Moneys

Effect of  
trust

In the case of money charged on land, the fact that it is also secured by an express trust does not prevent the right to recover it from being barred by the lapse of twelve years (*m*). The right to a sum of money to be raised under a conveyance of land to trustees for a term of years upon trust to raise a specific sum is barred at the expiration of twelve years from the date when the sum of money can be raised (*n*). When land is conveyed to trustees for a term of years upon trust to raise two sums of money and the right to one sum is barred the fact that the trustees are entitled to enter and raise the other sum does not enable them also to raise the sum which is barred (*n*).

**139** This limitation relates only to the recovery of money and therefore does not affect any proceeding which a mortgagee has a right to take for obtaining possession of the land itself (*o*).

Proceedings  
to recover  
land

**140** The limitation of twelve years applies to an action on a covenant by a mortgagor in a mortgage deed or on a collateral bond by the mortgagor securing the mortgage debt (*p*). But if in a mortgage deed the mortgagor and a surety jointly and severally covenant for the repayment of the mortgage debt this limitation though it applies to an action on the covenant against the mortgagor does not it seems apply to

Action on  
covenant in  
mortgage  
deed  
Mortgagor  
and surety

its being so charged did not however prevent the effect of the Limitation Act 1623 (21 Jac 1 c 16) (see p 39 *ante*) in limiting such personal remedies for the debt as fell within the provisions of that Act (see *Popple v Baker* (1789) 2 Cox Eq Cas 118 123 *Brookhurst v Jessop* (1830) 7 Sim 438 *Barnes v Glendon* [1899] 1 Q B 885 O A.) As to the meaning of land or rent see p 106 *post*. As to real property generally see title REAL PROPERTY AND CHATTELS REAL. As to liens and mortgages generally see respectively titles MORTGAGE LIEN pp 1 *et seq ante*.

(*m*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 10 see *R Stephens Warburton v Stephens* (1889) 43 Ch D 39 43 *Re Nugent's Trusts* (1880), 19 L R Ir 140 and p 103 *post*. This provision alters the law as laid down in previous cases (see *Burrows v Gore* (1808) 6 H L Cas 907 961).

(*n*) *Williams v Williams Re Hartley Williams v Jones* [1900] 1 Ch 102 see *Humble v Humble* (1807) 24 Beav 335 *Snow v Booth* (1856) 8 De G M & G 69 O A *Lawton v Ford* (1866) L R 2 Eq 97 *Re Birmingham's Estate* (1870) 5 I R Lq 147.

(*o*) *Doe d Jones v Williams* (1836) 5 Ad & El 291 296 *Re Seager's Estate Seager v Aston* (1857) 26 L J (Orr) 809 *Re Conlan's Estate* (1892) 29 L R Ir 199 see *Pugh v Heath* (1882) 7 App Cas 230 affirming S O (1881) 6 Q B D 340 O A *Wrixon v Vize* (1912) 3 Dr & War 104 *Dearman v Wyche* (1839) 9 Sim 570 *Du Vigier v Lee* (1843) 2 Hare 326 *Beamish v Whitney* [1908] 1 I R 38 *Hugill v Wilkinson* (1888) 38 Ch D 490. For the limitation of the right of the mortgagee against the land see p 145 *post*. A claim by a legal mortgagee for payment of principal and interest due on his mortgage brought in an action for the administration of the real and personal estate of a deceased owner of the equity of redemption is a proceeding within the Real Property Limitation Act, 1874 (37 & 38 Vict c 57) s 8 (*Waters v Lloyd* [1911] 1 I R 163 O A).

(*p*) *Sutton v Sutton* (1882), 22 Ch D 511, O A see *Kibble v Fairthorne* [1895] 1 Ch 219 *Fearnside v Flint* (1883) 22 Ch D 579 581 title BONDS Vol III p 100. Where a person covenanted with trustees for the payment of a sum of money after his death and charged certain land with the payment and no money was raised or interest paid it was held that the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8, applied and that the claim under the covenant was barred at the expiration of twelve years from the covenantor's death (*Re England, Steward v England* [1895] 2 Ch 820 O A).

- SECT. 1**  
**Principal**  
**Monies**
- an action against the surety (*q*) If the remedy against a surety remains unbarred, while that against the mortgagor is barred, the surety is it seems entitled to recover from the mortgagor as the principal debtor the amount which the surety may be compelled to pay in satisfaction of the debt (*i*)
- Action for rent**
- 141** The limitation of twelve years has no application to an action for rent due under a covenant in an indenture of demise (*s*), nor to a covenant in a mining lease to pay rents and royalties (*t*), in such cases the period of limitation is twenty years (*a*) The limitation of twelve years applies however, to an action for a rent charge due under a covenant (*b*)
- Simple contract debt charged on land**
- 142** The personal remedy on a simple contract debt charged on land is still governed by the Limitation Act, 1623 (*c*) and the period of limitation is six years from the accrual of the cause of action, but the remedy against the land is governed by the Real Property Limitation Act, 1874 (*d*) and the period of limitation is twelve years (*e*)
- Land tax.**
- 143** The limitation of twelve years applies to the yearly sums chargeable under the Land Tax Redemption Act 1802 (*f*), in favour of a lessee who has redeemed the land tax (*g*) and to the charge in respect of paving expenses on property under the Public Health Act, 1875 (*h*)
- Paving expenses**
- Lien**
- 144** The limitation of twelve years applies to the lien of a vendor of land for his purchase money (*i*)
- 
- (*q*) *Re Frisby Allison v Irusly* (1889) 43 Ch D 106 C A in which case this was the opinion of BOWEN L J and KAY J COTTON L J being of the contrary opinion and FRY L J expressing no opinion on the point As against the surety the limitation is twenty years by virtue of the Civil Procedure Act 1833 (3 & 4 Will 4, c 42) see p 76 ante and as to a bond executed by the surety only see title BONDS Vol III p 100 note (*l*) See also *Re Wolmershausen Wolmershausen v Wolmershausen* (1890) 62 L T 541
- (*r*) See *Gardner v Brooke* [1897] 2 I R 6 and see title GUARANTEE Vol XV pp 529 530
- (*s*) *Lewis v Graham* (1880) 80 L T Jo 66 *Donegan v Neill* (1880) 16 I R Ir 309 (decided under the Common Law Procedure Amendment (Ireland) Act 1853 (16 & 17 Vict c 113) s 20 which corresponds to the Civil Procedure Act 1833 (3 & 4 Will 4 c 32) s 3 and see title LANDLORD AND TENANT Vol XVIII p 488
- (*t*) *Darley v Tennant* (1885) 53 I T 257 and see title MINES MINERALS AND QUARRIES
- (*a*) Under the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 see p 76 ante
- (*b*) *Shaw v Crompton* [1910] 2 K B 370 As to rentcharges generally see title RENTCHARGES AND ANNUITIES
- (*c*) 21 Jac 1 c 16 see p 39 ante
- (*d*) 37 & 38 Vict c 57 s 8
- (*e*) *Re Stephens Warburton v Stephens* (1889) 43 Ch D 39 *Barnes v Glenton* [1899] 1 Q B 885 C A
- (*f*) 42 Geo 3, c 116, s 123 see title LAND TAX Vol XVIII p 325, note (*x*)
- (*g*) *Skene v Cook* [1902] 1 K B 682 C A.
- (*h*) 38 & 39 Vict c 55 s 257 see *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 Q B D 1 C A, and title HIGHWAYS, STREETS, AND BRIDGES Vol XVI, pp 225, 226
- (*i*) *Toft v Stephenson* (1851) 1 De G M & G 28 C A As to such lien, see titles LIEN, pp 1 et seq, ante, SALE OF LAND

## PART IV — MONEY CHARGED UPON OR PAYABLE OUT OF LAND ETC

### SUB SECT 2 — *Money Secured by a Judgment*

**145** Any proceeding to recover money secured by any judgment must be brought within twelve years after a present right to receive it has accrued to some person capable of giving a discharge (*j*)

SECT 1  
Principal  
Moneys

Money  
secured by  
judgment  
Judgment

**146** The limitation applies to any final judgment for the payment of a specific sum of money whether in law or in equity (*k*), and is not confined to a judgment which is a charge on the land, but refers to judgments generally (*l*) although it seems it is limited to an English judgment (*m*). The limitation extends to all proceedings of whatever kind for enforcing judgment, including a petition in bankruptcy (*n*), an administration action brought by a judgment creditor (*o*) and execution of any description (*p*)

### SUB SECT 3 — *Legacies and Personal Estate of Intestates*

**147** Any proceeding to recover a legacy must be brought within twelve years after a present right to receive it has accrued to some person capable of giving a discharge (*q*). The limitation applies to all legacies, whether charged on land or not (*r*) including annuities if charged on personalty only or on land outside England or Ireland (*s*) and also to a residue bequeathed by will or a share of such residue (*a*)

Legacies

**148** In the case of a legacy charged on land an express trust does not prevent time running (*b*). But in the case of a legacy not charged on land, the fact that it is secured by an express trust prevents time running (*c*) and if such a legacy or if residue of personal estate has been bequeathed to executors on trust and the character of executors merges in that of trustees the statutory

Effect of a  
trust

(*j*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8

(*k*) *Dunne v Doyle* (1860) 10 I Ch R 502 see Judicature Act 1875 (36 & 37 Vict c 66) s 100

(*l*) See titles EXECUTION Vol XIV p 6 JUDGMENTS AND ORDERS Vol XVIII p 219 *Evans v O'Donnell* (1886) 18 L R Ir 170 C A *Johnson v Lowry* [1900] 1 I R 316 *Re Tynte Ex parte Tynte* (1880) 15 Ch D 120

(*m*) As to actions founded on foreign judgments see p 39 ante

(*n*) *Re Tynte Ex parte Tynte supra*

(*o*) *Sherwood v Hannan* (1886) 17 I R Ir 210 C A and see 18 L R Ir 170 173

(*p*) See *Jay v Johnstone* [1893] 1 Q B 25 189 C A *Evans v O'Donnell supra* *Taylor v Holland* [1902] 1 K B 676 *O'Hara v Creagh* (1841) 10 Eng & T 65 but see p 99 post As to garnishee proceedings see *Fellows v Thornton* (1884) 14 Q B D 330 title EXECUTION Vol XIV p 95 After six years from judgment execution can only be issued with the leave of the court see title EXECUTION Vol XIV p 7

(*q*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8

(*r*) *Sheppard v Duke* (1839) 9 Sim 561

(*s*) *Re Ashwell's Will* (1859) John 112 see *Dower v Dower* (1880) 15 L R Ir 264 title LEGATORS AND ADMINISTRATORS Vol XIV p 264 An annuity given by will which though payable out of personalty is also charged on realty in England or Ireland is not a legacy within the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 but is rent and is governed by *ibid* s 1 (*Dower v Dower supra*) see p 115 post.

(*a*) *Prior v Horriblow* (1836), 2 Y & C (ex) 200 *Christian v Devereux* (1841) 12 Sim 264 see *Adams v Barry* (1845), 2 Coll 285

(*b*) Real Property Limitation Act 1874 (37 & 38 Vict c 57), s 10, see note (*m*) p 83 ante

(*c*) See p 83 ante and p 167 post



**SECT 1**  
**Principal**  
**Moneys**

limitation(d) ceases to apply in those cases which are not governed by the Trustee Act, 1888(e) The character of executor merges in that of trustee if the executor does any act which amounts to an assent to the legacy so bequeathed(f), or if he separates it from the assets(g) and in the case of a residue, if it is ascertained without more specific appropriation, but not until it has been ascertained(h) If a legacy is bequeathed *simpliciter* and not to the executor upon trust, but he by an act of his own constitutes himself trustee for the legatee and is not within the protection of the Trustee Act 1888(i) the legatee will not be barred by lapse of time(k) Unless the legacy is vested in the executor on express trusts the statute will run in his favour an implied or constructive trust will not prevent the statute from running(l)

**Personal**  
**estate of**  
**intestate.**

**149** An action to recover the personal estate or any share of the personal estate of an intestate possessed by the legal personal representative of the intestate must be brought within twenty years after a present right to receive the estate has accrued to some person capable of giving a discharge(m) This limitation applies

(d) Real Property Limitation Act 1844 (37 & 38 Vict c 57) s 6 see p 82 *ante*  
(e) 51 & 52 Vict c 59 s 8 see title EXECUTORS AND ADMINISTRATORS Vol XIV p 265 TRUSTS AND TRUSTEES and p 167 *post*

(f) *Byrchall v Bradford* (1822) Madd & G 13 235 *Dex v Burford* (1854) 19 Beav 409 see *Brougham (Lord) v Poulett (Lord W)* (1855) 19 Beav 119 133 134

(g) *Phillipo v Munnings* (1837) 2 My & C 309 see *Harcourt v White* (1860) 28 Beav 303 *Cadbury v Smith* (1869) L R 9 Eq 3; *O'Reilly v Walsh* (1872) 6 I R Eq 555 affirmed on appeal 7 I R Eq 167

(h) *Hallmott v Jenkins* (1838) 1 Beav 401 *Ex parte Dover* (1834) 5 Sim 500 *Darnport v Stafford* (1851) 14 Beav 319 331 *Dinsdale v Dudding* (1849) 1 Y & C Ch Cas 265 *Freeman v Dowding* (1856) 2 Jur (N S) 1014 *Downes v Bullock* (1858) 25 Beav 54 *Re Smith Henderson Roe v Hitchins* (1859) 42 Ch D 302

(i) 51 & 52 Vict c 59

(k) *Fyson v Jackson* (1861) 30 Beav 381

(l) *Re Davis (Jane) Re Davis (F H) Davis v Moore* [1891] 3 Ch 119 C A *Re Rowe Jacobs v Hind* (1889) 58 L J (CH) 703 C A *Re Barker Buxton v Campbell* [1892] 2 Ch 491 *Re Lacy Royal General Theatrical Fund Association v Lydd* [1899] 2 Ch 149 *Re Mackay Mackay v Gould* [1906] 1 Ch 25 see *Re M Causland's Trusts* [1908] 1 I R 327 As to an executor's position with regard to undisposed of residue see title EXECUTORS AND ADMINISTRATORS Vol XIV p 284 As to an executor *de son tort* see *ibid* pp 147 *et seq* and *Deyle v Foley* [1903] 2 I R 95

(m) Law of Property Amendment Act 1860 (23 & 24 Vict c 38) s 13 As to acknowledgments see p 92 *post* The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) made no provision for the case of the personal estate of an intestate The Law of Property Amendment Act 1860 (23 & 24 Vict c 38) s 13 rectified the omission and made the period of limitation the same as in the case of a legacy under the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) i.e. twenty years The Law of Property Amendment Act 1860 (23 & 24 Vict c 38) s 13 is not affected by the Real Property Limitation Act 1844 (37 & 38 Vict c 57) s 9 see *Sutton v Sutton* (1882) 22 Ch D 511 517 C A The Law of Property Amendment Act 1860 (23 & 24 Vict c 38) s 13 and the Real Property Limitation Act 1844 (37 & 38 Vict c 57) s 8 are *in pari materia* and to be construed together although the limitation in one case is twenty and in the other is twelve years (*Re Johnson Sly v Blake* (1885) 29 Ch D 964 970) The Law of Property Amendment Act, 1860 (23 & 24 Vict c 38) applies to cases of intestates who died before as well as to those who died after the passing of the Act (*Re Jemms, Willis v Howe (Earl)* (1880) 50 L J (CH) 4 *Re Johnson Sly v Blake, supra*, and see *Willis v Beauchamp (Earl)* (1886), 11 P D 59, C A)

to assets retained by the administrator and not distributed (n), and it seems, to the case of a testator who has not disposed of the whole of his property

# SECT 1 Principal Moneys

A claim by next of kin for general administration of the estate of an intestate is barred at the end of twenty one years from the death of the intestate (o) but with respect to assets of the intestate received by an administrator within twenty years of the commencement of the action the claim of the next of kin to administration, limited to such assets is not barred (p)

Claims for  
general  
administra-  
tion

## SUB SECT 4 — When Time begins to Run

### (1) In General

150 The period of limitation of twelve years (q) is reckoned from the time when a present right to receive the money has accrued to some person capable of giving a discharge for the same. The concurrence of two events is therefore necessary—(1) the existence of a present right to receive the money and (2) the existence of a person capable of giving a discharge for it. A present right to receive does not it seems in this provision mean a present right to enforce payment (r)

When time  
begins to run.

Present right  
to receive

### (11) Money Charged on Land

151 The right of a vendor of land to receive his purchase money which is secured by his lien, does not accrue (a) until the time for completion arrives or until the title is accepted, if that is subsequent to the time fixed for completion (b)

When right  
accrues

(n) *Re Johnson Sly v Blake* (1880) 29 Ch D 964 per CHITTY J at p 913 disapproving of the dictum to the contrary of Lord ROMILLY MR in *Reed v Iann* (1866) 35 L J (CH) 464

(o) *Re Johnson Sly v Blake supra* The additional year at the end of twenty years is conceded in conformity with the general rule that an executor or administrator is allowed in an administration case one year to complete the administration of the estate (*ibid* at p 910) and see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 262 285 As to proceedings by or against the Crown or a nominee of the Crown see *ibid* p 181

(p) *Re Johnson Sly v Blake supra*

(q) See Real Property Limitation Act 1874 (3 & 35 Vict c 31) s 8 and see p 82 *ante*

(r) See *Hansen Local Board v March Investment Building Society* (1889) 21 Q B D 1 C A per LORD LUSH MR at p 6 and per INDELLY LJ at p 9 but see *Re Purdie McLaughlin v Levy* [1906] 1 Ch 260 per KEREWICH J at p 269 (reversed on another point [1906] 2 Ch 340 C A) The words present right to receive are it has been said different in meaning from and apparently used in contrast to the expression accrual of a cause of action which is the point from which time begins to run under the Limitation Act 1874 (21 Jac 1 c 16) and the Civil Procedure Act 1853 (17 & 18 Vict c 42) (*ibid*) As to the rule under those statutes see pp 42 71 *ante*

(a) *I.e.* within the meaning of the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 see the text *supra*

(b) *Toft v Stevenson* (1854) 5 De G M & G 735 C A No Statute of Limitation is applicable to a charge on personal estate whether by way of vendor's lien or otherwise and the right under such a charge of the person entitled is not barred by lapse of time (*Re Stucley Stucley v Kekewich* [1906] 1 Ch 67 C A) see *Levy v Stogdon* [1898] 1 Ch 478 affirmed [1899] 1 Ch 50 C A (purchaser's lien for deposit paid on a contract for the sale of stock) *Glyn v Hood* (1859) 1 De G F & J 334, C A, *Re Lowes Settlement* (1861) 30 Beav 95 As

**SECT 1**  
**Principal**  
**Moneys**

Tenant for  
life of  
incumbered  
property  
Devises of  
residue

If the tenant for life of an incumbered estate fails to pay the interest on the incumbrances and a part of the incumbered property is sold to satisfy the interest the remainderman is entitled to a charge on the life estate, but he has no present right to receive the money till the death of the tenant for life (c)

If the whole of a testator's real estate is subject to a charge and a part of the real estate is specifically devised to one person and the residue is devised to other persons, and the charge is paid out of the proceeds of the sale of the residue the devisees of the residue are entitled to a contribution from the specific devisees even although the residue is subject to a trust for the payment of the testator's debts, and time runs against this right to contribution from the payment of the charge out of the residue (d)

Mortgage of  
reversionary  
interest

If the deed mortgaging a reversionary interest in real estate contains a covenant to pay the mortgage debt time runs against the mortgagee's right on the covenant from the date when the mortgage money became payable and at the expiration of twelve years from that date such right is barred although the reversion has not then fallen into possession (e)

Right of  
adminis-  
trator

If a sum of money charged on land becomes payable to the estate of an intestate in the interval between his death and the grant of administration it seems that time runs against the administrator from the date when the sum of money or legacy becomes payable although administration is not granted till after that date (f)

Money  
payable to  
trustees

**152** Trustees have by statute (g) the power of giving receipts which are a sufficient discharge of any person liable to pay. If therefore money is charged on land in favour of trustees upon trust for certain persons for life with remainder over time runs from the date when the money becomes payable (h). But if the

to sums which are a charge on premises by statute such as paving expenses see title HIGHWAYS STREETS AND BRIDGES Vol. XVI p. 224

(c) *Karwan v Kennedy* (1869) 3 I. R. Eq. 472 and see title III p. 23 ante. As to devisees of real estate generally see title WILLS

(d) *Re Allen Bassett v A'len* [1898] 2 Ch. 499

(e) *Kirkland v Peatfield* [1903] 1 K. B. 756. If there is no covenant to pay the personal remedy against the mortgagor to recover the mortgage money is barred at the expiration of six years from the date when the mortgage debt became due see p. 39 ante and as to a mortgagee's right against the land see p. 145 post as to his remedies generally see title MORTGAGE

(f) This seems to be the result of the Real Property Limitation Act 1833 (3 & 4 Will. 4 c. 27) s. 6 (sec. p. 170 post) which applies to all charges on land for all the purposes of the Act (*Re Williams Davies v Williams* (1886) 34 Ch. 1558) and therefore applies to the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57) s. 8 which has taken the place of the Real Property Limitation Act 1833 (3 & 4 Will. 4 c. 27) s. 40. See p. 52 ante. If this is so time may begin to run in this case although no present right to receive the money or legacy has accrued to a person capable of giving a discharge for the same (Real Property Limitation Act 1874 (37 & 38 Vict. c. 57) s. 8) for the money etc. may have become payable before the grant of administration. Compare the different rule under the Limitation Act 1623 (21 Jac. 1 c. 16) and the Civil Procedure Act 1833 (3 & 4 Will. 4 c. 42) see p. 82 ante

(g) *Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41) s. 36

(h) The law was different before the *Conveyancing and Law of Property Act 1881* (44 & 45 Vict. c. 41) in cases where the trustees had no power to give receipts (*M'Carthy v Daunt* (1848) 11 I. Eq. R. 29 see *Carroll v Hargrave* (1870) 5 I. R. 119 123). As to the general powers of trustees see title TRUSTS AND TRUSTEES

trustees do not act, and no trustees are appointed in their place time does not run as regards the remainder until the determination of the life interests (v)

SMOT 1  
Principal  
Moneys

(iii) *Judgment Debts*

**153** A present right to receive a judgment debt arises generally, when the judgment is recovered, but if the judgment debt is only payable subsequently to the recovery of the judgment time does not run against the judgment debtor, until the judgment debt becomes payable. Thus where a judgment is entered on a *post obit* bond time does not run against the judgment until the occurrence of the death upon which the bond becomes payable (k). In certain cases execution can only issue under an order of the court (l) but an order of this kind does not seem to give a new present right to receive the judgment debt so as to make the statute begin to run afresh (m).

Judgment

The recovery of a judgment debt in an action of debt on the original judgment will not extend the time for bringing any proceedings on the original judgment (n) but the new judgment creates a new judgment debt, and proceedings may be taken on it independently.

Action on a  
judgment

(iv) *Legacies and Personal Estate of Intestates*

**154** In the case of a legacy if there are assets time begins to run from the date when a present right to receive the legacy has accrued (o). If the legacy is payable on the happening of some future event time does not run against the legatee until the event happens (p).

Legacy

**155** When the residuary legatee is capable of ascertaining what is the clear residue and requiring payment of the amount (q).

Residue.

(i) *Carroll v Hargrave* (1810) 5 I P Dq 123

(k) *Barber v Shores Heir and terre tenants* (1539) 1 Jebb & S 610 *Gilman v Chute* (1847) 11 I L R 442 *Tudley v Hawkins* (1847) 4 C B 655 *Kennedy v Whaley* (1846) 12 I L R 54 see p 82 ante. So when a party is entitled to execution upon a judgment of assets *in futuro* (see R S C Ord 42 r 23 (c)) time does not run until there are assets. As to enforcement to judgments generally see title JUDGMENTS AND ORDERS Vol XVIII p 219.

(l) See title EXECUTION Vol XIV p 1.

(m) *Evans v O'Donnell* (1850) 16 I R Ir 440 per O'BRIEN J at p 452 18 L R Ir 170 C A. *Evans v O'Donnell supra* was followed by the Irish Court of Appeal in *Johnson v Inwry* [1900] 1 I R 316 C A where it was held that when a judgment creditor registered a judgment as a mortgage against the lands of the judgment debtor under the Judgment Mortgage (Ireland) Act 1850 (13 & 14 Vict c 29) s 7 the statute began to run from the date of the judgment and not from the date of the registration.

(n) *Watters v Ludwell* (1841) 9 I L R 362 *Kealy v Bodlin* (1841) 9 T L R 383.

(o) See title EXECUTORS AND ADMINISTRATORS Vol XIV p 264 note (s).

(p) *Prior v Hornblow* (1836) 2 Y & C (ex) 200 *Rudd v Rudd* [1895] 1 I R 15 C A. If a gift to a legatee is only absolute if he dies without issue time does not run against him during his life (*Lord v Lord* (1807) 3 Jur (N S) 485). As to annuities bequeathed by will see title EXECUTORS AND ADMINISTRATORS Vol XIV p 264 compare *Edwards v Warden* (1876) 1 App Cas 281. As to an annuity charged also on land see p 83 ante and p 115 post.

(q) *Prior v Hornblow supra*.

## SECT 1

Principal  
MoneysGeneral  
administra-  
tion

time begins to run against him that is, in ordinary cases, at the end of one year from the testator's death. But a residuary legatee may have a right to require payment to him of part of the assets at one time and part at another. If a sum has been set apart to satisfy an annuity he has no right to the sum until the annuity ceases and so long as the annuity lasts time will not run against the right to obtain payment of a sum so set aside (r). But the mere existence of an annuity for a long period cannot keep alive the right of a residuary legatee to a general account and administration of the testator's assets as distinguished from the right to recover particular assets as against the general right to administration time runs from the end of the year after the testator's decease (s). Time does not run against the right of a residuary legatee to recover particular assets which have actually come into the executor's hands until the assets have come into the executor's hands and a residuary legatee has at any time a right to an inquiry whether any assets of the testator have come into the executor's hands within twelve years of the bringing of the action (t).

Pecuniary  
legacies

**156** Until there are assets applicable in due course of administration for the payment of a pecuniary legacy the legatee cannot be said to have a present right to receive it (a). If more than twelve years after the testator's death a legatee claims payment on the death of an annuitant under the will then provided the annuity had priority over the legacy the legatee will be barred, unless he proves that there were no other assets available for the payment of the legacy till within twelve years of the claim (b). If the annuity had no such priority, the legatee will be barred because he had a right to make the annuity abate in his favour (c).

Reversionary  
legacies

**157** Where a legacy is demonstrative and directed to be paid out of a reversionary fund and the legatee has no right to require a sale of the fund while it is reversionary, time does not begin to run till

(r) *Bright v Archer* (1809) 27 Beav 130 4 De G & J 608 C A. The observation of ROMILLY M R (S C 7 Beav 130 at p 130) that in every case where a fund is set apart to satisfy an annuity there is a trust of the fund set apart in favour of the residuary legatee is it is submitted inaccurate the case is not within the principle of *Phillips v Munnings* (1831) 2 My & Cr 309 (see p 86 ante).

(s) See *Re Johnson Sly v Blake* (1885) 29 Ch D 964 *Re Ludlam Ludlam v Ludlam* (1890) 63 L T 330 and as to the duties to proceedings for administration see title EXECUTORS AND ADMINISTRATORS Vol XIV p 337.

(t) *Adams v Larray* (1845) 2 Coll 280 *Burns v Nichols* (1866) 1 R 2 F q 256 *Reed v Fenn* (1866) 35 I J (CH) 464 *Re Johnson Sly v Blake supra* *Re Ludlam Ludlam v Ludlam supra* and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 264.

(a) *Faulkner v Daniel* (1813) 3 Hare 199 212 *Ravenscroft v Iraby* (1844) 1 Coll 16 see *Prud v Proud* (1862) 11 W R 101.

(b) *Bright v Lancher supra*.

(c) *Rogers v Mullicent* (1860) 2 Dick 570 *Wroughton v Colquhoun* (1847) 1 De G & Sm 307 *Carr v Ingleby* (1831) 1 De G & Sm 362 *Long v Hughes* (1831) 1 De G & Sm 364 *Ashburnham v Ashburnham* (1846) 16 Sim 186 see *Bright v Callender* (1852) 2 De G M & G 652 C A *Todd v Bielby* (1859) 2 L Cav 353 *Lotts v Smith* (1869) 1 R 8 Eq 683 *Carmichael v Gee* (1880) 5 App Cas 588 *Pe Coltrill Buckland v Beddingfield* [1910] 1 Ch 404.

the reversion falls in (d), but if the legatee can require the sale of the fund before it falls into possession, time runs against him from the date when he could enforce the sale and the satisfaction of the legacy out of the proceeds (e) Where the legacy is given generally, and the only assets applicable for payment of the legacy are reversionary or contingent funds time will not begin to run against the legatee until the funds fall in (f)

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Principal  
Moneys

158 Where the person entitled to receive the legacy is also the executor who is liable to pay it the statute will not run so long as the two characters are thus united and if after it has begun to run the same union takes place the statute ceases to have any operation, as the legacy is in the hands entitled to receive it (g)

Legatee also  
executor

159 The principles with regard to time running between an executor and residuary legatee (h) apply equally as between an administrator and the next of kin (i) and also therefore as between an executor and the next of kin with regard to residue undisposed of (k)

Next of kin  
Intestacy

#### SUB SECT 5 — Disabilities

160 Although there is no express exception in favour of disabilities in the Real Property Limitation Act 1874 (l) s 8 the imposition of the condition precedent to the commencement of the running of time under that provision namely that there should be a person in existence who is capable of giving a discharge practically provides for two disabilities namely infancy and lunacy (m) If the person entitled to the money is an infant or non compos mentis he is incapable of giving a discharge (n)

Disabilities

Infancy and  
lunacy

Successive  
disabilities

A succession of these two disabilities in the case of the same

(d) *Earle v Bellingham* (No 2) (1851) 24 Beav 448 *Re Seager's Estate and Seager v Aston* (1857) 26 L J (CH) 809 *Re Ludlam Ludlam v Ludlam* (1890) 63 L T 332 and see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 264 275

(e) *Re Owen* [1894] 3 Ch 220

(f) *Re Blachford Blachford v Worsley* (1884) 27 Ch D 676 *Re Johnson Sly v Blake* (1885) 29 Ch D 964

(g) *Binns v Nichols* (1861) 1 R 2 Eq 206 *Re Blachford Blachford v Worsley supra* *Re Iardoe McLaughlin v Penny* [1906] 1 Ch 265

(h) See p 89 ante

(i) *Re Johnson Sly v Blake supra* see *Martin v Beauchamp (Earl)* [1868] W N 247 title EXECUTORS AND ADMINISTRATORS Vol XIV p 285

(k) See *Reed v Ienn* (1866) 30 L J (CH) 464 title EXECUTORS AND ADMINISTRATORS Vol XIV p 284

(l) 37 & 38 Vict c 51

(m) See *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 Q B D 1 C A

(n) See *Piggott v Jefferson* (1841), 12 Sim 26 Sugden on the Statutes relating to Real Property 2nd ed 129 As to the general incapacity of infants and of persons non compos mentis see respectively titles INFANTS AND CHILDREN Vol XVII pp 46 et seq LUNATICS AND PERSONS OF UNSOUND MIND pp 396 et seq post As to convicts see Forfeiture Act 1870 (33 & 34 Vict c 23) and p 63 ante Under the old law a husband had a right to receive but by the Married Women's Property Act 1882 (45 & 46 Vict c 75) s 1 the wife is capable of giving a discharge, see title HUSBAND AND WIFE, Vol XVI, pp 331 et seq

**SECT 1**  
**Principal**  
**Moneys**

persons, or of persons successively entitled, prevents time beginning to run (o)

No provision is made for the disability of persons liable to pay money (a)

**SUB SECT 6 — Acknowledgments and Payments**

(1) *In General*

**Effect of**  
**acknowledg**  
**ments and**  
**payments**

**161** In the case of a sum of money to which the Real Property Limitation Act 1874 (b) s 8 applies if some part of the principal money, or some interest thereon has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person by whom the money is payable or his agent, to the person entitled thereto or his agent an action to recover such money may be brought within twelve years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one (c)

To be effective the payment or acknowledgment must it seems at all events where the money is charged on land be made within twelve years after the accrual of the present right to receive (d)

The above enactment has received a very liberal construction (e)

(11) *Acknowledgments in Writing*

**Acknowledg**  
**ment in will**

**162** An acknowledgment of a debt in the will of the debtor is sufficient to take the debt out of the statute (f) and an admission

(a) See p 57 *ante* Where money is payable to several persons jointly and one or more of them is under either of the two above mentioned disabilities then if as in the case of partners or executors or otherwise a discharge can be given without the concurrence of those under disability time it seems would run as against all but otherwise it would not run against any until all are free from disability the above mentioned rule as to successive disabilities would in this case extend to successive disabilities affecting the different persons to whom money is jointly payable

(a) *Boldero v Halpin* *Ex parte Hughes* (1810) 19 W R 320 see *Brookwell v Bullock* (1889) 22 Q B D 561 C A and p 110 *post*

(b) 37 & 38 Vict c 57

(c) Real Property Limitation Act 1874 (31 & 38 Vict c 57) s 8 compare pp 58 67 79 *ante* 101 forms of acknowledgment see *Encyclopædia of Forms and Precedents* Vol I pp 189—195

(d) *Hervy v Wynn* (1905) 22 T I R 93 *Crescen v Hindley* (1846) 10 Jur 383 *Homan v Andrews* (1850) 1 I Ch R 106 see *Lecher v Delacour* (1881) 11 L R I 187 *Beamish v Whitney* [1908] 1 I R 38 For decisions to the contrary effect see *Harty v Davis* (1850) 13 I L R 23 *Re Clifden (Lord) Annaly v Agar Ellis* [1900] 1 Ch 774 *Liddle v Fairthorne* [1895] 1 Ch 219 224 but it seems that these decisions are not to be followed in any case where the money is charged on land (*Sutton v Sutton* (1882) 22 Ch D 511 C A.) The principles stated in the text *supra* are not affected by the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 91) s 14 (see p 81 *ante*) which does not apply to the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 therefore a payment or acknowledgment by a co debtor will prevent the latter provision running against his co-debtor see *Re Frisby Allison v Frisby* (1889) 43 Ch D 106 C A *Re Powers Lindsay v Phillips* (1885) 80 Ch D 291 C A *Lewin v Wilson* (1886) 11 App Cas 639 P C *Re Seager's Estate, and Seager v Aston* (1857) 26 L J (Ch) 809 *Baile v Irwin* [1897] 2 I R 614 see *Brew v Brew* [1899] 2 I R 163 *Re Kingston's (Earl) Estate* (1869) 3 I R Eq 485

(e) *Blair v Nugent* (1846) 3 Jo & Lat 608 613 and as to payment of interest on a judgment, see *Williams v Welch* (1846) 3 Dow & L 565

(f) *Mullington v Thompson* (1852) 3 I Ch R 236 see *Scott v Synge* (1891), 27 L R Ir 590, C A, compare pp 58 62, *ante*

## PART IV — MONEY CHARGED UPON OR PAYABLE OUT OF LAND ETC

of a debt by a bankrupt in his balance sheet, statement of affairs, or examination is, it seems, a sufficient acknowledgment, and may be set up by the creditor in an independent action, but not in the bankruptcy proceedings themselves (g)

SMO 1  
Principal  
Moneys

If the tenant for life of a fund subject to legacies becomes a lunatic and the fund is transferred into court and invested in an account which is called the account of the lunatic and of the legatees, this acts as an acknowledgment by the lunatic of the claim of the legatees (h) But the report of a master of the court in an action in which a debtor is a defendant is not a sufficient acknowledgment the master not being the agent of the debtor (i)

Bankrupt's  
balance sheet  
Acknowledg-  
ment by the  
court  
Master's  
report

In the case of a lien on land the person by whom the money is payable is the person entitled to the land on which the charge is sought to be fixed and who will lose the land if he does not pay the charge (l)

Lien

An acknowledgment by the agent of trustees under a will by which property bought by the testator but not paid for, is devised, will keep alive the vendor's lien as against the *ceteris que trust* (l) and an acknowledgment of a debt by a trustee to whom lands are devised on trust to pay debts is sufficient to take the debt out of the statute (m)

Acknowledg-  
ment by  
trustees

**163** The acknowledgment need not state the amount of the debt alleged to be due (n) and therefore, an acknowledgment which merely refers to the debt in question is sufficient (o), and parol evidence is admissible to show that the debt referred to but not correctly described, in the acknowledgment is the one sought to be recovered (p)

Amount need  
not be stated  
Parol  
evidence to  
explain  
acknowledg-  
ment

(g) See *Jarrett v Birmingham* (1811) 4 L. J. Q. R. 33; *Morrogh v Power* (1842) 5 I. L. R. 494 *Dugdale v Vize* (1843) 5 I. L. R. 568 *Hanan v Power* (1843) 8 I. L. R. 505 *Re Clendinning Ex parte Anderson* (1859) 9 I. Ch. R. 284 *Re West's Estate* (1879) 3 L. R. Ir. 77 and see title BANKRUPTCY AND INSOLVENCY Vol. II p. 71 In *Hervey v Wynn* (1905) 22 T. J. R. 93 SWINFEN EADY J. doubted whether a statutory declaration by a mortgagor as to a mortgage debt made in proceedings on a petition for an inquiry in lunacy with reference to the soundness of mind of the mortgagee was a sufficient acknowledgment on the ground that it was not made to the person entitled

(h) *Re Walker* (1871) 1 Ch. App. 120

(i) *Hill v Stawell* (1840) 2 I. L. R. 302 and see p. 189 *post* In *Barrett v Birmingham supra* at p. 546 O'LOGHLEN M.R. doubted the correctness of the decision in *Hill v Stawell supra* but it is submitted without good reason and there is no inconsistency between the decision in *Hill v Stawell supra* and that in *Barrett v Birmingham supra* The creditor in *Hill v Stawell supra* was not a party to the suit see *Wrixon v Vize* (1842) 3 Dr. & War. 104 123

(k) *Toft v Stephenson* (1851) 1 De G. M. & G. 28 O. A. *per* Lord CRANWORTH L.C. at p. 40

(l) *Toft v Stephenson supra*

(m) *St John (Lord) v Boughton* (1838) 9 Sim. 219 As to an acknowledgment by the agent of the owner of the equity of redemption see *Waters v Lloyd* [1911] 1 I. R. 153 O. A. and p. 94, *post*

(n) *St John (Lord) v Boughton supra* at p. 225

(o) *Jortin v South Eastern Rail Co* (1855) 6 De G. M. & G. 270, O. A.

(p) *Hanan v Power, supra, Dugdale v Vize, supra.*



## SECT 1

(111) *Payments***Principal  
Moneys**

Payment  
must be made  
by person  
liable to pay

**164** The Real Property Limitation Act 1874 (g), s 8 does not define by whom or to whom a payment should be made (r), but it means that the payment must be made by the person liable to pay (s). The payment must be made either by the debtor himself or by someone directly or indirectly authorised to act on his behalf, or by someone who, as owner of land which is charged with the debt makes a payment in respect of the debt in order to preserve his interest in the land payment by a stranger without the authority of the debtor is only a voluntary present of a sum of money to the creditor (t).

If a mortgagee of a contingent reversionary interest in land and of a policy of insurance receives from the insurance office the surrender value of the policy, this is not a payment within the statute (a) but the payment of premiums on a policy effected for the benefit of creditors may be a sufficient payment to take the debt and interest out of the statute (b).

Receipt of  
rent by mort-  
gagee in

Payment of  
rent by  
receiver

Payment by  
one of two  
mortgagors

By person  
entitled to  
make a  
tender of  
mortgage  
debt.

**165** If a mortgagee enters into possession and receives the rent of mortgaged real estate the payment of rent by the tenant is not a payment within the statute (c) but payment of the net rents to the mortgagee by a receiver of mortgaged property appointed under the Conveyancing and Law of Property Act 1881 (d) is sufficient to take the debt out of the statute (e).

Payment by one of two mortgagors who covenant jointly and severally to pay the mortgage debt prevents the statute from running in favour of the other mortgagor (f).

Payments made by a person who under the terms of a mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender for the defeasance or redemption of the mortgage (g) and payment of interest by a person who, as

(g) 37 & 38 V c 57

(r) See *Brew v Brew* [1899] 2 I R 163 166

(s) *Chinnery v Evans* (1864) 11 H L Cas 115 *Homan v Andrews* (1800) 1 I Ch R 106 *Harlock v Ashberry* (1882) 19 Ch D 539 C A *Newbould v Smith* (1885) 29 Ch D 882

(t) See *Homan v Andrews supra* at p 112 *Chinnery v Evans supra* *Stamford Spalding and Boston Banking Co v Smith* [1892] 1 Q B 760 C A *per Lord HERSCHELL* at p 769 *Alston v Mineard* (1906) 51 Sol Jo 132 and see p 73 *ante* but compare *Vincent v Willington* (1842) Long & T 456

(a) *Re Clifden (Lord) Annaly v Agar Lillis* [1900] 1 Ch 774 in which *BYRNE J* refused to follow *Re Conlan's Estate* (1892) 29 L R Ir 199 (where the facts were very similar) see *Staley v Barrett* (1856) 26 L J (CH) 321, C A *Re Irwin* [1907] 1 I R 357

(b) *Scott v Synges* (1891) 21 L R Ir 560 C A see *Re Greene's Estate* (1884), 13 L R Ir 461 C A

(c) *Harlock v Ashberry* (1892) 19 Ch D 539 C A

(d) 44 & 45 Vict c 41 ss 19 24 See title MORTGAGE

(e) *Berwick & Co v Price* [1900] 1 Ch 632 see *Chinnery v Evans supra* where payment by a receiver appointed under an Irish statute (stat (1/71) 11 & 12 Geo 3 c 10) was held to be payment by the agent of the mortgagor, and compare p 72 *ante*

(f) *Baile v Irwin* [1897] 2 I R 614 and see note (d) p 92, *ante*.

(g) *Lewin v Wilson* (1886), 11 App Cas 639, P Q

SECT 1  
Principal  
Moneys

between himself and the mortgagor, is bound to pay it, although he is under no contract with the mortgagee to do so (*h*) are payments sufficient to prevent the statute from running, but payment by a mortgagor after he has assigned the property charged does not prevent time running in favour of the assignee (*i*)

**166** The payment of interest by the principal debtor prevents the statute from running in favour of the surety (*h*) and payment of interest by a surety prevents the statute from running in favour of the principal debtor (*i*) Where the owner of lands is liable to indemnify the owner of other lands against a charge thereon a payment by the person liable to indemnify if made on account of such charge will keep the charge alive against the other lands (*n*)

Payment by  
principal or  
surety

**167** Part payment by an administrator to one of the next of kin out of a particular asset which has fallen in within twenty years will not revive the right to sue for general administration which was barred by statute at the time of payment (*n*)

Payment by  
adminis-  
trator

**168** A payment by compulsion of law out of the property of a debtor is sufficient to prevent the statute from running in his favour (*o*) Thus payment of part of a debt by a sheriff out of the proceeds of an execution levied under a judgment (*p*) and part payment made under an order of court out of a fund belonging to the debtor which is in court are sufficient (*q*) But part payment under a judgment in an action on a judgment will not prevent the statute from running against the original judgment debt (*r*)

Payment by  
compulsion  
of law

(*h*) *Bradshaw v Widdington* [1902] 2 Ch 430 C A

(*i*) *Newbould v Smith* (1886) 33 Ch D 121 C A affirmed on other grounds (1889) 14 App Cas 423 see *Lyll v Luker* [1813] W N 208

(*j*) *Re Powers Lindsay v Phillips* (1860) 30 Ch D 291 C A *Re Fri by Allison v Frisby* (1889) 43 Ch D 106 C A *Lewin v Wilson* (1886) 11 App Cas 639 P C

(*l*) *Re Seager's Estate and Seager v Aston* (1801) 26 L J (Ch) 609 see p 92 ante

(*m*) *Homan v Andrews* (1800) 1 I Ch R 106

(*n*) *Re Johnson Sly v Blair* (1885) 29 Ch D 964 (under the Law of Property Amendment Act 1860 (3 & 24 Vict c 38) s 13) see p 90 ante and title EXECUTORS AND ADMINISTRATORS Vol XIV p 285

(*o*) *Brew v Brew* [1899] 2 I R 163 *Cronin v Dennehy* (1869) 3 I R C L 289

(*p*) *Brew v Brew supra* see *Chinnery v Evans* (1864) 11 H L Cas 115 125 In *Brew v Brew supra* *Morgan v Rowlands* (1812) L R 7 Q B 493 was distinguished as being under another statute (Limitation Act 1623 (21 Jac 1 c 16)) the rules as to acknowledgment under which are different from those under the Real Property Limitation Act 1844 (37 & 38 Vict c 37) s 8 see p 92 ante

(*q*) *Cronin v Dennehy supra* decided under the Common Law Procedure Amendment (Ireland) Act 1853 (16 & 17 Vict c 113) s 23 the provisions of which on this point are to the same effect as those of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 40

(*r*) *Taylor v Holland* [1902] 1 K B 676 see *Brew v Brew supra* but see *Harlock v Ashberry* (1882) 19 Ch D 639 C A per Lord Esher, M R, at p 648 and compare *Lhwates v M Donough* (1839) 2 I Eq R 97

## SECT 1

**Principal  
Moneys**Constructive  
payment.

**169** When the person entitled to the interest on money charged on land is also entitled to the income of the land, payment of the interest will be presumed and time will not run (s) but the fact that a mortgagee of land is himself the owner of an undivided portion of the mortgaged land does not give rise to such constructive payment of interest as to prevent the statute from running in favour of the owner of the remaining portion (t)

One debt  
several  
secured

**170** If several estates are comprised in one mortgage, a payment, on account of the debt out of the rents of one of them keeps the security alive against the others even if they have passed into the hands of *bona fide* purchasers for value (a)

Effect of  
payment by  
part or  
limited  
owner

The same principle applies where the fee simple of a single estate after being mortgaged is divided into particular interests and a payment or acknowledgment is made by the owner of one particular interest or where a devisee of part of a testator's land or a person having a partial interest in such land or part of it makes a payment or acknowledgment in respect of a debt of the testator although such debt is not expressly charged on the land (b) Thus payment of interest on a mortgage debt by a devisee of the mortgaged lands keeps alive the right of the mortgagee to resort to the residuary personal estate or the other real estate of the testator in the event of the security of the mortgaged lands proving insufficient (c) and if the tenant for life of the real estate of a testator or of part of it makes a payment on account of a debt of the testator such payment will keep the debt alive as against the persons interested in remainder (d) But payment of interest by a tenant for life on a charge made when the statutory period has previously expired without any payment being made does not revive the charge as against the remainderman (e)

Payment of  
interest on  
statute barred  
debt.

(s) *Burrell v Eyremont (Earl)* (1844) 1 Beav 205 *Topham v Louth* (1887) 35 Ch D 60; *Re Hawes* *Re Burchell* *Burchell v Hawes* (1892) 62 L J (Ch) 463 (where the principle was applied to a married woman entitled to a charge on land of her husband) see note (b) p 73 ante

(t) *Re Eunnegans Estate* [1906] 1 I R 310 see *Re England* *Steward v England* [1890] 2 Ch 820 O A *Re Allen* *Bassett v Allen* [1898] 2 Ch 499

(a) *Chinnery v Evans* (1864) 11 H L Cas 115 where the payment was made by a receiver appointed over several estates but who entered into possession of one estate only see *Re Greene's Estate* (1864) 13 L R Ir 461 O A *Chinnery v Evans* *supra* and as to mortgages generally title MORTGAGE

(f) As regards acknowledgments under the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 see cases cited note (d) p 81 ante

(c) *Re Lacey* *Howard v Lightfoot* [1907] 1 Ch 330 O A *Leahy v De Moleyns* [1896] 1 I R 206 O A (cited with approval by VAUGHAN WILLIAMS L J in *Re Lacey* *Howard v Lightfoot* *supra*) and compare p 74 ante The decision in *Dickenson v Teusdale* (1862) 1 De G J & Sm 52 to the contrary effect cannot now be regarded as an authority on this point see *Re Lacey* *Howard v Lightfoot* *supra*

(d) *Pears v Laving* (1871) 1 P 12 Eq 41 *Roddam v Morley* (1857) 1 De G & J 1 see *Re Hollingshead* *Hollingshead v Webster* (1888) 37 Ch D 651 *Re Hunt Bird v Godfrey* [1905] 2 Ch 225 *Barclay v Owen* (1889) 60 L T 220 *Chinnery v Evans* *supra* *Dibb v Haller* [1893] 2 Ch 429, compare *Ames v Mannering* (1859) 26 Beav 553 and see p 74, ante

(e) *Lecher v Delacour* (1880) 11 L R Ir 18,

SECT 2 — *Arrears of Rent or Interest Charged on Land or in respect of a Legacy, and of Lower*SECT 2  
Arrears of  
Rent etcSUB SECT 1 — *Arrears of Rent or Interest*(1) *In General*

171 The period of limitation for the recovery of arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest is six years after the arrears have become due and this period applies whether the arrears are sought to be recovered by distress or by an action founded on a legal or equitable right (f)

Period of  
limitation for  
arrears of  
rent or  
interest

There is here no provision express or implied for disabilities (g)

Disabilities

172 Some actions for arrears of rent and interest are within the terms both of the Limitation Act 1623 (h) s 3 and of the Real Property Limitation Act, 1833 (i) s 42. To this class belong actions for arrears of rent reserved without specialty (k) and actions for use and occupation. The time limited by both statutes is the same but the Real Property Limitation Act 1833 (i) s 42 makes no allowance for disabilities which are provided for by the Limitation Act 1623 (l). The Real Property Limitation Act 1833 (i) is not intended to take away from debtors any right to or to give any additional rights to creditors (m).

Simple  
contract debts  
charged on  
land

It seems that in actions which fall within both statutes allowance should be made for disabilities (n).

Disability

173 Some cases (o) are within the words both of the Civil Procedure Act 1833 (p) s 3 and of the Real Property Limitation Act 1833 (q) s 42. In this class of cases such as actions for rent or royalties due under a covenant in an indenture of demise (a) the rule is that in an action on the covenant or in an action of

Action for  
rent secured  
by a specialty

(f) Real Property Limitation Act 1833 (3 & 4 Will 3 c 27) s 42

(g) See *De la Cour v Owen* (1850) 5 Exch 166 157 Ex Ch *Cannell v Gorman* [1898] 1 I R 20 C A but see *Nixon v Darley* (1868) 2 I R C I 467 and p 91 ante

(h) 21 Jac 1 c 16 see p 58 ante

(i) 3 & 4 Will 4 c 27

(k) As to rent reserved under a specialty see p 77 ante

(l) 21 Jac 1 c 16 see *ibid* s 7 stat (100) 4 & 5 Ann c 3 s. 19 and p 58 ante

(m) *Barnes v Glendon* [1899] 1 Q B 685 891 C A

(n) The Limitation Act 1623 (21 Jac 1 c 16) only applies to proceedings by way of action the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) applies to proceedings by way of distress which are not within the Limitation Act 1623 (21 Jac 1 c 16)

(o) See p 77 ante

(p) 3 & 4 Will 4 c 42 see p 76 ante

(q) 3 & 4 Will 4 c 42 The difficulty of reconciling the two statutes is increased by the fact that they were both passed in the same session of Parliament and that the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) although passed after the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) came into operation before it

(a) See *Darley v Fennant* (1885) 53 L T 257 *Donegan v Neill* (1880)

**SMOT 2**  
**Arrears of**  
**Rent etc**

debt grounded upon a specialty twenty years arrears are recoverable (b), but that in all other proceedings by the creditor, such as distress the Real Property Limitation Act 1833 (c), s 42, applies and only six years arrears are recoverable (d)

**Debt secured**  
**by specialty**  
**and also**  
**charged on**  
**land**

**174** Some cases are within the words of the Civil Procedure Act 1833 (c) s 3 the Real Property Limitation Act 1874 (f) s 8, and the Real Property Limitation Act 1833 (g) s 42 namely where interest or an annuity is charged on land and is also secured by specialty To this class belong actions for interest due under a covenant in a mortgage deed or for arrears of an annuity charged on land and secured by a covenant in a deed (h) The rule in these cases is that in an action on the covenant the period of limitation fixed by the Real Property Limitation Act 1874 (f) applies and twelve years arrears are recoverable but that in all other proceedings by the creditor such as a foreclosure action in the case of a mortgage and distress where the deed granting the annuity gives a power of distress the Real Property Limitation Act 1833 (g), s 42 applies and only six years arrears are recoverable (i)

**Rentcharge**  
**secured by**  
**covenant**

**175** A case may be within the words of the Civil Procedure Act 1833 (e) s 3 the Real Property Limitation Act 1874 (f) s 1 and the Real Property Limitation Act 1833 (g) s 42 Such is the case

16 L R Ir 309 It seems that an action against a surety who covenants to pay a mortgage debt and interest is not within the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 42 as the debt of the surety is not charged on his land (*Re Lewis Lindsay v Phillips* (1855) 30 Ch D 291 C A but see *Re Frisby Allison v Frisby* (1869) 43 Ch D 106 C A)

(b) See p 11 ante

(c) 3 & 4 Will 4 c 27

(d) *Lagett v Toley* (1836) 2 Bing (N C) 619 see *Hartshorne v Watson* (1836) 4 Bing (N C) 116 *Darley v Lennant* (1850) 33 L T 201 *Donigan v Neill* (1885) 16 I L R 309 *Re Dullins minors ex parte Walsburton* (1841) 10 I Eq R 206 *Humphrey v Cery* (1849) 1 C B 361 compare *Thomas v Syllister* (1813) 1 R 8 Q B 368 *Christie v Farler* (1854) 53 L J (Q B) 531 C A *Seamle v Cool* (1890) 43 Ch D 519 C A *Re Lougher Ex parte Bayly* (1852) 22 I J (BOY) 26 C A

(e) 3 & 4 Will 4 c 42 see p 76 ante

(f) 31 & 38 Vict c 57 see p 82 ante

(g) 3 & 4 Will 4 c 21 see p 97 ante

(h) Generally speaking the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 applies to principal money due the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 42 to interest and rent but there are cases where interest and rent are within the former provision

(i) *Sutton v Sutton* (1851) 27 Ch D 511 C A *Fearnside v Flint* (1883) 22 Ch D 519 *Re England Steward v England* [1895] 2 Ch 820 C A *Strachan v Thomas* (1840) 12 Ad & 11 36 505 *Manning v Phelps* (1854) 10 Exch 59 *Re Nugent's Trusts* (1867) 19 I R Ir 140 *Hunter v Nockolds* (1850) 1 Mac & G 640 *Sinclair v Jackson* (1853) 17 Beav 405 *Hughes v Kelly* (1843) 5 I Eq R 286 *Thompson v Hurly* [1900] 1 I R 568 and see title DISTRESS Vol LI p 109 In *Strachan v Thomas supra* which was decided when the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 40 was in force it was held that twenty years arrears of interest could be recovered in an action on a covenant to secure an annuity charged on land but the effect of the Real Property Limitation Act 1874 (37 & 38 Vict c 51) s 8 and of *Sutton v Sutton supra* is it seems to reduce the period of limitation in such a case to twelve years compare *Shaw v Crompton* [1910] 2 K B 310.

of a rentcharge where there is a covenant to pay, and here the rule is the same as in cases mentioned in the preceding paragraph (k)

SPOT 2  
Arrears of  
Rent etc

176 There are some cases which are within the words both of the Real Property Limitation Act, 1874 (l) s 8, and the Real Property Limitation Act 1833 (m) s 42. To this class belong proceedings to recover interest due under a judgment or lien or in respect of a legacy. It seems that in such cases the Real Property Limitation Act 1833 (m) s 42 applies and that only six years arrears are recoverable (n).

Interest due  
under judg-  
ment lien or  
legacy

#### (u) Arrears of Rent

177 The words arrears of rent (o) mean rent of every kind (p), and include not only rent reserved but also rent as an incorporeal hereditament and every kind of rentcharge (q) a yearly sum chargeable on land for the benefit of a lessee who has redeemed the land tax thereon (i) a gross sum of money charged on land and payable by periodical instalments (s) and an annuity charged on land or on land and personalty (t). The word rent in the phrase charged upon or payable out of any land or rent means rent existing as an incorporeal hereditament and not rent reserved (a).

Meaning of  
rent

If the mortgagee of a life estate enters into possession and remains in possession after the death of the tenant for life the

Rent recover-  
able by  
remainder  
man against  
mortgagee in  
possession

(k) *Shaw v Crompton* [1910] 2 K B 370

(l) 37 & 38 Vict c 57 see p 82 ante

(m) 3 & 4 Will 4 c 21

(n) See p 91 ante *Tift v Stevenson* (1854) 5 De G M & G 735 O A

(o) See Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 42 p 97 ante

(p) See Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 1 see p 107 post but not arrears of tithe rentcharge see note (q) *infra* and p 109 post

(q) *Strachan v Thomas* (1840) 12 Ad & El 536 508 *Hunter v Noelolds* (1800) 1 Mac & G 640 *Humfrey v Gery* (1849) 7 Cl L 267 (a fee farm rent) *James v Salter* (1837) 3 Bing (N C) 244 *Irish Land Commission v Grant* (1880) 10 App Cas 14 *Jones v Withers* (1896) 74 L T 272. In Ireland the provision has been held to apply to tithe rentcharge (*Conolly v Gorman* [1895] 1 I R 20 C A). In England only two years arrears of tithe rentcharge can be recovered (Tithe Act 1891 (54 & 55 Vict c 8) s 10 (2)).

(r) See Land Tax Redemption Act 1802 (42 Geo 3 c 116) s 123 *Shene v Cook* [1902] 1 K B 682 and title LAND TAX Vol XVIII p 326

(s) *Uppington v Tarrant* (1861) 12 I Ch R 262

(t) *Roch v Callen* (1848) 6 Hare 331 *Francis v Grover* (1845) 5 Hare 39 *Ferguson v Livingston* (1846) 9 I Lq R 202 *Re Ashwell's Will* (1809) John 112 *Re Nugent's Trusts* (1850) 19 I R Ir 140. If an annuity is charged on personalty only twelve years arrears may be recovered (*Re Ashwell's Will supra* see *Roch v Callen supra* and p 85 ante) unless it is also secured by specialty in which case twenty years arrears may be recovered (*Francis v Grover supra* and see p 77 ante) see *Paget v Foley* (1836) 2 Bing (N C) 679. The right of an annuitant to resort to the corpus is not within the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 (*Re Belton's Estate* [1894] 1 I R 537). As to annuities charged on land and also secured by specialty see p 77 ante. As to annuities generally see title RENTCHARGES AND ANNUITIES. As to interest due to a surety on a contract of indemnity, see *Scottish Provident Institution v Conolly* (1893) 31 L R Ir 329.

(a) See p 107, post

**SECT 2** remainderman in an action of the nature of an equitable ejectment  
**Arrears of Rent etc** against the mortgagee cannot recover more than six years arrears of rent (b)

**Relief against forfeiture** **178** A lessee is not entitled to relief against forfeiture for non payment of rent or to have proceedings stayed in an action to enforce such forfeiture, unless he pays all arrears of rent due (c)

**Renewal of lease.** If a lease contains a covenant for perpetual renewal it seems that the lessee is only entitled to renewal on payment of all moneys due under the lease that have not been paid no regard being had to lapse of time or any Statute of Limitation (d)

(iii) *Arrears of Interest Charged on Land or in respect of a Legacy*

**"Money charged upon land"** **179** The words 'money charged upon or payable out of any land or rent' (e) are to be read exactly as if the cases of mortgage judgment and lien had been enumerated as in the Real Property Limitation Act 1874 (f) s 8 (g)

**Judgments** **180** As regards judgment debts no more than six years arrears of interest can be recovered whether the interest is directly secured by the judgment or given by statute (h)

**Mortgages within the statute** **181** A mortgage of a reversionary interest in the proceeds of the sale of land devised upon an absolute trust for conversion is within the statute (i) but a mortgage of a reversionary interest in the residuary personal estate of a testatrix which was invested on mortgage of real estate is not (j)

**Money charged on reversion** **182** If money is charged on a reversion in land, not more than six years arrears of interest can be recovered before the reversion falls into possession by any proceeding other than an action on a covenant to pay (l)

(b) *Hickman v Lysall* (1876), 4 Ch D 141 C A

(c) See title LANDLORD AND TENANT Vol XVIII pp 544 545 The Conveyancing Act 1881 (44 & 45 Vict c 41) s 11 (6) has no application and it does not appear that any Statute of Limitation applies there is no direct authority on this point in England but see *Croft v London and County Banking Co* (1885) 14 Q B D 347 C A As to Ireland see *Peckham v Dunne* (1854) 9 I C L R 422 The court may impose terms as a condition of relief to underlessees see title LANDLORD AND TENANT Vol XVIII p 546

(d) *Coutney v Jarler* (1861) 16 I Ch R 320 but see Land Law (Ireland) Act 1896 (59 & 60 Vict c 41) s 16 *Fyfe v Coen* (1894) 33 I L J 59

(e) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 42 see p 31 ante

(f) 57 & 38 Vict c 51

(g) *Henry v Smith* (1842) 4 I Eq R 502 see *Willand v Peatfield* [1903] 1 K B 706 see p 80 ante

(h) Judgments Act 1837 (1 & 2 Vict c 110) s 17 *O Kelly v Bodkin* (1841) 3 I Eq R 390 *Henry v Smith* supra *Joley v Dumas* (1839) Smythe 18 *Re Fitzgerald M Donnell v Fitzgerald* [1897] 1 I R 506 and see title JUDGMENTS AND ORDERS Vol XVIII p 209

(i) See the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 see *Bouvier v Woodman Ex parte Clarke* (1867) L R 3 Eq 313

(j) *Smith v Hill* (1878) 9 Ch D 143 There is no Statute of Limitation which applies while the interest is reversionary (*ibid*) As to a mortgage of personality see *Clarkson v Henderson* (1880) 14 Ch D 348 and see p 173 p 1 As to mortgages generally see title MORTGAGE

(k) *Vincent v Going* (1841), 7 I L R 463 *Sinclair v Jackson* (1853),

**183** If land is conveyed by a mortgage deed to hold until the mortgage debt with interest is repaid, but there is no covenant to pay the debt and interest only six years arrears of interest are recoverable (l) The result is the same if the covenant in a mortgage deed to pay principal does not in terms extend to the payment of interest, and interest is only recoverable in an action on the covenant by way of damages

**SECT 2**  
**Arrears of**  
**Rent etc**

**Mortgage**  
**with no**  
**covenant to**  
**pay interest**

**184** In a foreclosure action the mortgagee can only recover six years arrears of interest, even if there is a covenant in the mortgage deed to pay interest (m) The same rule applies to analogous proceedings taken by a mortgagee to recover interest such as a petition or other proceeding to obtain out of court the proceeds of the sale of the mortgaged property (n), but not when the proceedings are taken by the mortgagor or debtor and the mortgagee is simply resisting (o)

**Foreclosure**  
**actions**  
**Petition for**  
**payment out**  
**of court**

In a redemption action a mortgagor can only redeem on payment of all arrears of interest (p) If the proceeds of the sale of mortgaged

**Redemption**  
**actions**

Beav 405 see *Humble v Humble* (1857) 24 Beav 535 539 *Smith v Hill* (1878) 9 Ch D 143 The decision of *Wood v O* to the contrary effect in *Wheeler v Howell* (1857) 3 K & J 198 is not to be regarded as an authority see *Re Turner Turner v Spencer* (1894) 43 W R 103 *Re Lambert's Estate* [1906] 1 I R 220 O A

(l) *Hodges v Croydon Canal Co* (1840) 3 Beav 86

(m) *Sinclair v Jackson* (1803) 17 Beav 405 *Hughes v Kelly* (1843) 5 I Eq R 236 *Hunter v Nockolds* (1850) 1 Mac & G 640 *Round v Bell* (1861) 31 L J (CH) 127 *Re Lloyd Lloyd v Lloyd* [1903] 1 Ch 385 401 O A see *Phwantes v M Donough* (1839) 2 I Eq R 97 In a foreclosure action the specialty debt will not be tacked so as to allow of the recovery of twelve years arrears (*Louthian v Hasel* (1790) 3 Bro C O 162) except as against the heirs of the mortgagor when the heirs are bound by the specialty (*Elvy v Norwood* (1802) 5 De G & Sm 240) As to foreclosure see further title MORTGAGE

(n) *Re Stead's Mortgaged Estates* (1806) 2 Ch D 713 and see title MORTGAGE

(o) *Re Lloyd Lloyd v Lloyd supra* approving of *Edmunds v Haugh* (1866) L R 1 Eq 418 and *Re Marshfield Marshfield v Hutchings* (1887) 34 Ch D 721 distinguishing *Re Stead's Mortgaged Estates* (1876) 2 Ch D 713 and overruling *Re Slaters Trusts* (1879) 11 Ch D 227 and in part *Bowyer v Woodman Ex parte Clarke* (1867) 1 R 3 Iq 313 see *Re Bolton's Estate* [1894] 1 I R 37

(p) *Re Lloyd Lloyd v Lloyd supra* *Dingle v Coppen Coppen v Dingle* [1891] 1 Ch 726 *Re Lloyd Lloyd v Lloyd supra* only applies when the mortgage is a subsisting mortgage and has not been barred by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 34 (*Re Hazeldene's Trusts* [1909] 1 Ch 34 O A) see p 155 post It only applies to proceedings in the nature of a redemption action (*Re Owen Lewis Estate* [1903] 1 I R 348) Questions have arisen as to the right of the mortgagee in a redemption action to tack a specialty debt as against the heirs of the mortgagor who are bound by the specialty (see *Elvy v Norwood supra*) but in consequence of the decision in *Re Lloyd Lloyd v Lloyd supra* these cases it seems are now of little practical importance As to the right of a plaintiff in an action in which only six years arrears are recoverable out of the land to recover out of the land the difference between six and twelve years arrears where the plaintiff can recover such difference by a personal action against a third person and the third person can recover it by way of indemnity out of the land, see *Harrison v Dugnan* (1842) 2 Dr & War 295 *Byrne v Dugnan* (1846) 3 Jo & Lat 116 *Willson v Leonard* (1840) 3 Beav 373 If land is charged with a debt but there is no right of foreclosure and the debt is statute barred and the land is in the hands of a trustee who enters into possession in



- SECT 2**  
**Arrears of Rent etc** premises have been paid into court and the mortgagor or his representatives apply for payment of the surplus after satisfaction of the mortgage debt and interest, such proceedings are analogous to a redemption action and the application will only be granted on the mortgagor paying all arrears of interest (*q*)
- Sale by mortgagee** If a mortgagee sells the mortgaged property under a power of sale, he is entitled to retain all arrears of interest (*r*)
- Ejectment by mortgagee** **185** In ejectment by a mortgagee against a mortgagor the court has statutory (*s*) power to stay proceedings and compel the reconveyance of the mortgaged lands to the mortgagor upon payment into court of all the principal moneys and interest due upon the mortgage and of costs. In such cases all arrears of interest would apparently have to be paid by the mortgagor as in a redemption action
- Mortgagee in possession** In accounts between a mortgagor and mortgagee in possession the mortgagee is it seems bound to account for all rents and profits received during the time of his possession however long that may be (*a*) so that all interest accrued due during that time would have to be brought into account but if on deducting the rents and profits from the amount due more than six years arrears of interest appear unsatisfied only six years arrears would be treated as due in a foreclosure action but all the arrears of interest unpaid would be treated as due in a redemption action (*b*)
- Arrears recoverable by puisne mortgagee when land has been in possession of prior incumbrance** **186** If a prior incumbrancer has been in the possession of any land or in receipt of the profits thereof within one year next before an action is brought by a person entitled to a subsequent incumbrance on the same land the person entitled to such subsequent incumbrance may recover the arrears of interest which have become due during the whole time that such prior incumbrancer was in such possession although such time may have exceeded the term of six years (*c*) But arrears of interest due for a period preceding the possession of the prior incumbrancer are not recoverable by virtue of this provision (*d*) If a claim is brought by a person entitled to an incumbrance against a reversioner the possession of a person entitled to an incumbrance on the estate of a tenant for life of the
- the interest of the persons entitled to the land and who is entitled in his own right to the debt on which nothing has been paid a reconveyance of the land may be ordered by the trustee to the persons entitled without requiring the payment of the debt (*Shea v Moore* [1894] 1 I R 158 C A)
- (*q*) *Edmunds v Haugh* (1866) L R 1 Eq 418 *Re Lloyd Lloyd v Lloyd* [1903] 1 Ch 385 C A As to the practice in Ireland see *Re Blennerhassett's Estate* [1911] 1 I R 16 C A
- (*r*) *Re Marshfield Marshfield v Hutchings* (1881) 34 Ch D 721
- (*s*) Common Law Procedure Act 1852 (15 & 16 Vict c 76) ss 219, 220 see title MORTGAGE
- (*a*) *Hord v Easton* (1856) 2 Jur (N S) 729
- (*b*) See p 101 *ante* As to arrears of jointure due to a jointress who takes possession see *Battersby v Rochfort* (1847) 10 I Eq R 439
- (*c*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 The term incumbrancer here includes a judgment creditor (*Henry v Smith* (1842) 2 Dr & War 381 390)
- (*d*) *Montgomery v Southwell* (1843) 2 Con & Law 263

land during the life of such tenant, does not bring the case within the provision (e)

SECT 2  
Arrears of  
Rent etc  
—

An agreement between a puisne incumbrancer and a prior incumbrancer in possession that the later charge shall have precedence over the earlier does not exclude the puisne incumbrancer from the benefit of the proviso if he has no right to take possession of the land (f). If the owner of incumbered land takes an assignment of an incumbrance to a trustee for himself then although he is in possession, neither he nor his trustee is an incumbrancer within the meaning of the above provision and a subsequent incumbrancer will not in such case have the benefit of it (g).

187 If personal property is vested in trustees to secure an annuity or a legacy the case is taken out of the Real Property Limitation Act 1833 (h) s 42 (u) but a trust to secure an annuity charged on land or rent does not keep alive a right to recover arrears which would have been barred had there been no such trust (j).

Effect of a  
trust.

(iv) Dower

188 No arrears of dower can be recovered by any action for a longer period than six years (l).

Arrears of  
dower

#### SUB SECT 2 — Acknowledgments

189 If an acknowledgment in writing of the arrears to which the Real Property Limitation Act, 1833 (l) s 42 applies (m) is given to the person entitled to the arrears or his agent (n) signed by the person by whom the arrears are payable or his agent all arrears in respect of which the acknowledgment is given are recoverable if sued for within six years after it is given (o) even if it would seem if they accrued more than six years before the

Acknowledg  
ment in  
writing

(e) *Vincent v Goring* (1844) 1 Jo & Lat 631 see *Smith v Hill* (1878) 9 Ch D 143

(f) *Drought v Jones* (1840) 2 I R q R 303

(g) *Chinnery v Evans* (1861) 11 H L Cas 115

(h) 3 & 4 Will 4 c 27

(i) See *Re Blachford Blachford v Worsley* (1864) 27 Ch D 676 and p 85 ante

(j) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 10 see *Hughes v Coles* (1884) 27 Ch D 231 *Re Montalt's (Earl) Estate* [1909] 1 I R 390 *Re Drake's Estate* [1909] 1 I R 136 and p 141 post As to the law before the Act see *Cox v Dolman* (1852) 2 De G M & G 592 *Snow v Booth* (1856) 8 De G M & G 69 C A As to annuities generally see title RENT CHARGES AND ANNUITIES

(k) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 41 *Bamford v Bamford* (1846) 5 Haie 203

(l) 3 & 4 Will 4 c 27

(m) See p 97 ante

(n) See *Holland v Clarke* (1842) 1 Y & O Ch Cas 101

(o) With the exception of the points mentioned in this sub section the provisions of the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 and of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 as to acknowledgments are so nearly alike that the same rules of construction apply, and the cases as regards acknowledgment decided under the first named provision apply to questions arising under the other see *Re Fitzmaurices, minors* (1864) 15 L Ch R 445 and see p 92 ante

|  |   |
|--|---|
| <b>SECT 2</b>                            | acknowledgment and even if it is given after the commencement of proceedings to recover the arrears ( <i>p</i> )  |
| <b>Arrears of Rent etc</b>               | There is no provision in the Real Property Limitation Act 1833 ( <i>q</i> ) s 42, as to part payment of interest ( <i>r</i> ) and part payment of an instalment of interest or rent does not prevent the operation of this statutory provision as to the balance ( <i>s</i> )                                 |
| <b>Part payment</b>                      | An acknowledgment by a mortgagor that more than six years arrears of interest are due on a first mortgage does not affect a puisne incumbrancer and such incumbrancer is entitled in a foreclosure suit by the first mortgagee to redeem the first mortgage on payment of six years arrears only ( <i>t</i> ) |
| <b>Acknowledgment by first mortgagor</b> | An acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years arrears of interest are due on a mortgage, is not valid as against the estate ( <i>u</i> )  |
| <b>By one of two executors</b>           |   |

## Part V—Land or Rent

### SECT 1—General Effect of the Real Property Limitation Acts 1833 and 1874 as regards Land and Rent

|                             |   |
|-----------------------------|---|
| <b>Period of limitation</b> | <b>190</b> The period of limitation for proceedings for the recovery of land and of such incorporeal hereditaments as for this purpose are on the same footing as land which in the statutes ( <i>a</i> ) are included in the term rent is twelve years from the time when the right first accrued ( <i>b</i> ) |
| <b>Right of entry</b>       | No mere entry on land nor continual claim made on or near it can keep alive a right of entry which would otherwise be barred ( <i>c</i> ) All remedies for recovering land or rent which formerly existed in cases where the right of entry is gone are done away with by the                                   |

(*p*) *Irislam v Harte* (1811) Long & T 196 As to an acknowledgment by the court on behalf of a lunatic see *Re Waller* (1811) 7 Ch App 120 For forms of acknowledgments see *Encyclopædia of Forms and Precedents* Vol I pp 192 193

(*q*) 3 & 4 Will 4 c 27

(*r*) As to other provisions relating to payment see pp 67 79 92 *et seq ante*

(*s*) *Astbury v Astbury* [1898] 2 Ch 111 115 Payment of an annuity may prevent the annuity being barred under the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 27) and 1874 (37 & 38 Vict c 57) and yet only six years arrears may be recoverable because of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 (see *Francis v Grover* (1845) 5 Hare 39)

(*t*) *Bolding v Lane* (1863) 1 De G J & Sm 122 see *Chinnery v Evans* (1864) 11 H L Cas 115 116 *Levin v Wilson* (1886) 11 App Cas 639 645 P C *Astbury v Astbury supra*

(*u*) *Astbury v Astbury supra*

(*a*) *See* Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) Real Property Limitation Act, 1874 (37 & 38 Vict c 57) see p 107 *post*

(*b*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1, which was substituted for the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 2 under which the period of limitation was twenty years As to claims by the Crown which is not bound see p 159 *post* The Real Property Limitation Act, 1874 (37 & 38 Vict c 57) came into force on the 1st January 1879

(*c*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27), ss 10, 11, see p 130, *post*

abolition of real actions (*d*) No right of entry or action can be now taken away by any other means than lapse of time (*e*)

When a sufficient period has elapsed to bar the right of entry, action, or distress the title in respect of which the right existed is simultaneously extinguished (*f*)

**191** The time within which a right can be enforced is extended in certain cases of disability but in no case is the period of limitation to exceed thirty years (*g*)

Limitations are provided for the claims of mortgagors where the mortgagees are in possession (*h*) and for the claims of persons entitled to estates tail or remainders expectant on such estates (*i*)

**192** Proceedings in equity are limited to the same period as actions at law subject to exceptions in certain cases of fraud and trust (*j*)

Proceedings in any spiritual court to recover property must be brought within the same periods as proceedings in the civil courts (*k*)

Special limitations are provided for claims of spiritual and eleemosynary corporations sole to church property and advowsons (*l*)

**193** The Real Property Limitation Act 1833 (*m*) put an end to the doctrine of adverse possession in reference to questions arising under that Act and, except in relation to landlord and

SECT 1  
General  
Effect  
of the Real  
Property  
Limitation  
Acts

Extinguish-  
ment of title  
Disabilities  
Mortgagors  
Estates tail

Proceedings  
in equity

Spiritual  
courts

Church  
property

Adverse  
possession

(*d*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 36 which is repealed by the Civil Procedure Acts (Circuit Act 1879 (42 & 43 Vict c 59) but the repeal (see *ibid* s 4 (1)) is not to revive or restore any usage practice procedure or other matter or thing not existing or in force at the passing of the Act and see title ACTION Vol I pp 33-34 No descent cast discontinuance nor warranty will now defeat any right of entry (*ibid* s 39) As to the meaning of descent cast see Co Litt 237 b Re Co on Real Actions 81-87 of discontinuance see Co Litt 25 a 3 n b Roscoe on Real Actions 13-33 *Doed Currey Im h* (1532) 1 Nev & M (K B) 130 of warranty see Co Litt 36 a 39 b 1 n Abr tit Warranty

(*e*) Tines were abolished by the Tines and Recoveries Act 1801 (3 & 4 Will 4 c 74) see title REAL PROPERTY AND CHATELS PART

(*f*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 31 see p 130 *post* The right of a lord of the manor to *seise quousque* is a right of entry within the meaning of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) see title COHYOLDS Vol VIII p 39

(*g*) Real Property Limitation Act 1814 (31 & 36 Vict c 51) s 3 see pp 133 134 *post*

(*h*) Real Property Limitation Act 1814 (37 & 38 Vict c 51) s 1 As to the claims of mortgagees see p 130 *post*

(*i*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) ss 21 22 Real Property Limitation Act 1814 (31 & 38 Vict c 57) s 6 see p 130 *post*

(*j*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) ss 24-27 see title EQUITY Vol XIII pp 166 167 170 and p 169 *post* Suits in equity had not been expressly mentioned in previous Statutes of Limitation

(*k*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 7) s 43 and see title ECCLESIASTICAL LAW Vol XI pp 389 390 As to the jurisdiction of the ecclesiastical courts see *ibid* p 312 and title EXECUTORS AND ADMINISTRATORS Vol XIV p 152 Tithes have now been commuted (see p 109 *post*) and cannot now be the subject of suits in the ecclesiastical courts

(*l*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) ss 29-33

(*m*) 3 & 4 Will 4, c 27

**SECT 1**  
**General**  
**Effect**  
**of the Real**  
**Property**  
**Limitation**  
**Acts**

tenant (n) mortgagors and mortgagees (o), advowsons (p), and trusts (q) the only question under the Statutes of Limitation in force with regard to land or rent is whether twelve years have elapsed since the claimant's right accrued whatever be the nature of the possession of the present holder (r)

**SECT 2 — Definitions**

**SUB SECT 1 — Land**

**I and**  
**Tithes**

**194** "Land in the Real Property Limitation Acts 1833 and 1874 (s) includes manors messuages, and all other corporeal hereditaments whatsoever tithes other than tithes belonging to a spiritual or eleemosynary corporation sole and any share estate or interest in such hereditaments or any of them whether such interest is a freehold or chattel interest and whether freehold or copyhold or held according to any other tenure (a)

**Exceptions**

Land does not include any incorporeal hereditaments except those tithes which do not belong to spiritual or eleemosynary corporations sole (b) nor an advowson in gross and an action for the foreclosure or redemption of the mortgage of an advowson is not within any Statute of Limitations (c)

**Advowsons**

(n) See p 127 *post*

(o) See p 145 *post*

(p) See p 153 *post*

(q) See p 125 *post*

(r) *Nepean v Doe d Knight* (1837) 2 M & W 894 2 Smith L C 11th ed 555 601 Ex Ch As to adverse possession before the Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) see *Taylor d Atkyns v Horde* (1757) 1 Burr 60 11 L and notes to 2 Smith L C 11th ed 649 *Scott v Nisron* (1843) 3 Dr & War 388 405 *O Sullivan v M Sweeney* (1839) 2 I L R 89 94 *Doe d Jones v Williams* (1836) 5 Ad & El 291 296 *Culley v Doe d Taylerson* (1840) 11 Ad & El 1008 1025 But see pp 125 128 148 154

(s) 3 & 4 Will 4 c 27 36 & 37 Vict c 51

(a) Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) s 1 As to the meaning of the terms freehold and chattel interest see title REAL PROPERTY AND CHATELS REAL As to the meaning of land compare title LANDLORD AND TENANT Vol XVIII pp 411 41

(b) In *Melish v Brooks* (1840) 3 Beav 22 it was held that turnpike tolls (see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 62) were not land within the meaning of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 and the decision is applicable to the whole of that Act and to the Real Property Limitation Act 1874 (37 & 38 Vict c 57) Land in the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 2) and 1874 (37 & 38 Vict c 57) includes minerals and a right to mineral strata by lapse of time can only be gained under these Acts see *Willinson v Proud* (1843) 11 M & W 33 As to the meaning of tithes in the Acts see *Ely (Dean) v Bliss* (1852) 2 De G M & G 459 *Ely (Dean) v Cash* (1846) 15 M & W 617 *Shannon (Lord) v Hodder* (1837) 2 L I R 223 *Shannon (Lord) v Stoughton* (1841) 3 I L R 521 Ex Ch *Shel v Incorporated Society for the Promotion of English Protestant Schools in Ireland* (1847) 10 I L R 411 see also *Bunbury v Fuller* (1853) 9 Fx Ch 111 The Tithe Act 1837 (2 & 3 Will 4 c 100) which deals with the time required for the exemption or discharge of land from tithes is unaffected by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) and see title ECCLESIASTICAL LAW Vol XI p 744 *Shel v Incorporated Society for the Promotion of English Protestant Schools in Ireland supra* As to tithes generally, see title ECCLESIASTICAL LAW Vol XI pp 742 *et seq*

(c) *Brooks v Muckleston* [1909] 2 Ch 519 522 As to the effect of delay in such a case, see p 173 *post*

An action brought by a widow to obtain an assignment of dower is not an action to recover land within the above provision (d)

SECT 2  
Definitions

SUB SECT 2 — *Rent*

Rent

**195** Certain incorporeal hereditaments are included in the Real Property Limitation Acts 1833 and 1874 (e) under the word 'rent' which extends to all heriots and all services and suits for which a distress may be made and all annuities and periodical sums charged upon or payable out of any land in England or Ireland except moduses or compositions belonging to a spiritual or eleemosynary corporation sole (f)

Rent is frequently used in the Real Property Limitation Acts, 1833 and 1874 (g) in close conjunction with land ( land or rent ) and when so used does not mean rent reserved on leases for years (h) but rent existing as an inheritance distinct from the land (i) Thus, a person entitled to the reversion expectant on the determination of a lease may distrain for the rent thereby reserved at any time during the existence of the lease although no payment of such rent has been made for more than twelve years (j) and this is the case also with regard to penal rents (l)

In some places in the Real Property Limitation Act 1833 (l) the word rent is used in the sense of rent reserved and sometimes (m) is thus used in the same section as rent that is rent existing as an inheritance distinct from the land but when rent is used in conjunction with the word land ( land or rent ) it always means rent existing as an inheritance and nothing else

In the Real Property Limitation Act 1833 (n) s 42 rent means both rent existing as an inheritance and rent reserved hence although no length of time will bar the right to recover rent reserved by a lease, so long as the lease under which it is reserved exists,

(d) *Williams v Thomas* [1909] 1 Ch 713 C A overruling *Marshall v Smith* (1865) 5 Giff 37 No Statute of Limitation applies to such an action As to dower generally see title REAL PROPERTY AND CHATTELS REAL see also title HUSBAND AND WIFE Vol XVI pp 407 446 and compare p 103 *ante*

(e) 3 & 4 Will 4 c 27 37 & 38 Vict c 57

(f) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 1 An annuity charged on land in any other country than England or Ireland is not within the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 27) and 1874 (37 & 38 Vict c 57) (*Pett v Dacre* (1876) 3 Ch D 295)

(g) 3 & 4 Will 4 c 27 ss 3 4 1—9 12—14 15 20—22 24—26 29 34 42 37 & 38 Vict c 57 ss 1—3 5—8 10

(h) See title LANDLORD AND TENANT Vol XVIII pp 464 *et seq*

(i) *Grant v Lillis* (1841) 9 M & W 113 *Donegan v Neill* (1885) 16 I P R 309 compare p 99 *ante*

(j) *Grant v Lillis supra Burns v Lumley* (1869) 16 W R 614 see *Crosbie v Sugrue* (1845) 9 I I P 17 *Jarke v M'Loughlin* (1801) 1 I C I R 166 *Spratt v Sherlock* (1803) 3 I C L R 69 The opinion to the contrary expressed in *Doe d Mannion v Bingham* (1841) 3 I I R 406, is not now to be regarded as authoritative As to the effect of payment of rent to a person wrongfully claiming the reversion see p 128 *post*

(k) *Daly v Bloomfield* (1842) 5 I L R 65

(l) 3 & 4 Will 4 c 21

(m) See *eg ibid* ss 8 9

(n) 3 & 4 Will 4 c 27 limiting the amount of arrears of rent recoverable

## PART 2

## Definitions

yet the amount of arrears recoverable is limited in the same way as arrears of rent existing as an inheritance (o)

The limitation prescribed by the Real Property Limitation Act, 1874 (p) s 1 applies not only as between persons claiming an estate or interest in the rent as an inheritance but also as between the owner of such rent and the owner of the land out of which it issues and therefore such rent will become extinguished by non payment (q)

## Heriots.

**196** Although heriots (r) are expressly mentioned in the interpretation clause of the Real Property Limitation Act 1833 (s) as included in the word rent yet they are not within those provisions which bar and extinguish the right of a person entitled (t) Rents which are payable at greater intervals than twenty years are it seems within the same class and are not within the definition (u)

## Reliefs

**197** Reliefs it seems are not suits and services within the word rent as defined by the Real Property Limitation Act 1833 (a) and as they are payable on events which occur at uncertain intervals they are not periodical sums of money within the definition of rent (b)

## Quit rents.

**198** Quit rents whether arising out of freehold (c) or out of copyhold (d) lands are within the definition of rent So also are

(o) See pp 91 99 ante

(p) 31 & 35 Vict c 57

(q) Real Property Limitation Act 1874 (31 & 38 Vict c 57) s 1 Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 34 *De Beaumont v Owen* (1850) 5 Exch 166 Ex Ch *James v SALTER* (1837) 3 Bing (N O) 544 *Manning v Phelps* (1854) 10 Exch 59 see *Dower v Dower* (1850) 15 L R Ir 264 *The Duke's Estate* [1909] 1 I R 136 *Re Maunsell's Estate* [1911] 1 I R 271 But as to an annuity charged on land and secured by an express trust see p 141 post

(r) As to the nature and incidents of heriots see title COPYHOLDS Vol VIII p 31 et seq 1 Scriven on Copyholds 310—375 3rd ed 438 6th ed 211 in ed 247 2 Watkins on Copyholds 167 4th ed 191 Sugden on the Statutes relating to Real Property 2nd ed 16 *Chichester (Earl) v Hall* (1811) 1 I T (O S) 121

(s) 3 & 4 Will 4 c 21 s 1 see p 101 ante

(t) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 34 Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1 *Zouche (Lord) v Dalbair* (1875) 1 I R 10 Exch 172 expressly decides that the taking of a heriot due by custom is not within the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 2 (now the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1) As to heriot service the right to recover a particular heriot by distress or action may be barred under the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 within six years of its becoming due (see pp 97 99 ante) but see *Zouche (Lord) v Dalbair supra* at p 180 It is doubtful whether heriots of any kind are within the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1 or the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 3 34 42 (*Zouche (Lord) v Dalbair supra* *Owen v De Beaumont* (1847) 16 M & W 517 566) and see title COPYHOLDS Vol VIII p 45 It was held under stat (1540) 32 Hen 8 c 2 that neither heriots nor any accidents or services which might not become due within the time limited by that Act were included within its provisions (*Lewis's Case* (1575) 4 Co Rep 8a 10 b Co Litt 115 a)

(u) See *Zouche (Lord) v Dalbair supra per KELLY CB* at p 178

(a) 3 & 4 Will 4 c 27 s 1

(b) As to the nature of reliefs see title COPYHOLDS Vol VIII p 45

(c) *Owen v De Beaumont supra* *Chichester (Earl) v Hall supra*

(d) *Howitt v Harrington (Earl)* [1893] 2 Ch. 497

such services due for the holding of land as cleaning the parish church, or ringing the church bell at stated times, these being services for the omission of which a distress might be made (e)

SECT 2  
Definitions

Various  
services  
Tithe rent  
charge

199 A tithe rentcharge (f), except one belonging to a spiritual or eleemosynary corporation sole (g) is subject to the provisions of the Tithe Act 1836 (h), within the Real Property Limitation Acts 1833 and 1874 (i) and not only do the latter apply as between rival claimants to a tithe rentcharge in lay hands but such tithe rentcharge is liable to be extinguished by non receipt for twelve years (h)

### SUI SECT 3 — Person

200 'Person' in the definition clause of the Real Property Limitation Act 1833 (l) includes a body politic, corporate or collegiate, and a class of creditors or other persons. The poor of a parish constitute a class of persons within the meaning of that Act (m)

Person

Person through whom another person is said to claim means any person by through or under, or by the act of whom the person so claiming became entitled to the interest claimed as he is issue in tail tenant by the courtesy of England tenant in dower successor, special or general occupant executor administrator legatee, husband assignee appointee devisee or otherwise and also any person who was entitled to an estate or interest to which the person so claiming or some person through whom he claims became entitled as lord by escheat (n)

Person  
through whom  
another  
claims

### SECT 3 — Periods of Limitation

201 No person can make an entry or distress or bring an action to recover any land or rent (o) except within twelve years

Twelve years  
limitation

(e) *Doe d Fdney v Benham* (1847) 7 Q B 916 Co Litt 96 b see *Doe d. Robinson v Hyde* (1843) 2 Mood & R 441

(f) See title ECCLESIASTICAL LAW Vol XI pp 71 et seq

(g) See p 106 ante and p 152 post

(h) 6 & 7 Will 4 c 71

3 & 4 Will 4 c 27 37 & 38 Vict c 57

(i) *Irish Land Commission v Grant* (1864) 10 App Cas 14 *Irish Land Commission v Ryan* [1900] 2 I L 565 C A see *Irish Land Commission v Junkin* (1888) 24 I R Ir 40 *Sheil v Incorporated Society for the Promotion of English Protestant Schools in Ireland* (1847) 10 I R Q R 411 to the contrary effect is not to be regarded as an authority As to tithes in the City of London see title ECCLESIASTICAL LAW Vol XI pp 145 103

(l) 3 & 4 Will 4 c 21

(m) *St Mary Magdalen College Oxford (President etc) v A G* (1807) 6 II L (as 189 The overseers of a parish may as trustees acquire by the statute a title to land over which the inhabitants of the parish for the statutory period have exercised rights of ownership (*Hargh v West* [1893] 2 Q B 19 C A) See *Wimbledon and Lutney Commons Conservators v Nicol* (1854) 10 T L R 241

(n) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 1 Appointee means here appointee under a general power of appointment not it seems an appointee under a special power of appointment when the power of appointment is not in substance created by the appointor himself (*Re Devon s (Earl) Settled Estates, White v Devon (Earl) Re Steer Steer v Dobell*, [1896] 2 Ch 562 570)

(o) As to the meaning of these words, see pp 106 107 ante.



**SECT 3**  
**Periods of**  
**Limitation**

next after the time at which the right to make such entry or distress or to bring such action has first accrued to some person through whom he claims or if such right has not accrued to any person through whom he claims within twelve years next after the time at which the right to make such entry or distress or to bring such action has first accrued to him (p)

**SECT 4—When time begins to Run (q)**

**SUB SECT 1—Dispossession or Discontinuance of Possession by Rightful Owner**

(1) *I and*

Time runs  
from  
dispossession  
or discon-  
tinuance

**202** If a person claiming land or some person through whom he claims has been in possession or in receipt of the profits of such land (r) and has while entitled thereto been dispossessed or has discontinued such possession or receipt his right is to be deemed to have first accrued at the time of such dispossession or discontinuance of possession or at the last time at which any such profits were received (u)

What  
constitutes  
dispossession  
or discon-  
tinuance  
Dispossession

**203** Dispossession is where a person comes in and puts another out of possession, discontinuance of possession is where the person in possession goes out and another person takes possession (b)

The true test whether a rightful owner has been dispossessed or not is whether ejectment will lie at his suit against some other person (c) The rightful owner is not dispossessed so long as he has all the enjoyment of the property that is possible (d), and

(p) Real Property Limitation Act 1844 (37 & 38 Vict c 54) s 1 As to the meaning of person through whom he claims see p 109 *ante*

(q) The time at which the right to make an entry etc accrues is defined in certain cases in the Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) ss 3—8 and in the Real Property Limitation Act 1844 (37 & 38 Vict c 57) s 2 The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 consists of five branches the first of which deals with dispossession or discontinuance of possession by the rightful owner (see the text *infra*) the second and third with wrongful possession on death of or alienation by the rightful owner (see p 114 *post*) the fourth (as enlarged by the Real Property Limitation Act 1844 (37 & 38 Vict c 57) s 2) with future estate (see p 116 *post*) and the fifth with forfeitures and breaches of condition (see p 121 *post*)

(r) As to receipt of rent being receipt of profits see p 113 *post* For the definition of land see p 106 *ante*

(a) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 see *Queen v De Beauvoir* (1841) 16 M & W 547 564

(i) *Faus v Buxton* (1850) 14 Ch D 537 *per* FRY J at p 540 *Littledale v Liverpool College* [1900] 1 Ch 13 C A

(c) As to what the plaintiff in such an action must allege and prove see *Dawkins v Leentyn* (Lord) (1855) 4 App Cas 51 *Danford v McAnulty* (1883) 8 App Cas 456 *Layford Atlyn v Horde* (1701) 1 Burr 60 H L *Nepean v De d Knight* (1837) 2 M & W 894 and the notes in 2 Smith L C 11th ed 615 *Poole v Griffith* (1864) 15 I C L R 239 241 286 Ex Ch *Cole Law and Practice in Ejectment* 6 As to the action of ejectment see title ACTION Vol I pp 34 46 As to the enforcement of a judgment for the recovery of possession of land see title EXECUTION Vol XIV p 76 As to actions by landlord against tenant for recovery of land see title LANDLORD AND TENANT Vol XVIII pp 558 559

(d) *Tottenham v Byrne* (1861) 12 I C L R 376 *Reilly v Thompson* (1871),

where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment. To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it (e).

SECT 4  
When Time  
begins to  
Run

Mere going out of possession is not enough in order that the statute may operate there must be not only going out of possession on the part of the owner but also actual exclusive possession for the statutory period by someone else to be protected (f). If a person enters on the land of another and before he has acquired a title under the statute abandons possession no one else then taking possession the rightful owner is in the same position as if no intrusion had taken place (g). Further the discontinuance of possession must be by a person entitled to such possession (h).

Legal  
requirements  
of discon-  
tinuance

**204** The mere fact that land is taken under the Lands Clauses Consolidation Act 1845 (i) for the purposes of a public undertaking and is not superfluous land does not prevent a person who has exclusive possession of such land for the statutory period from acquiring title under the statute (h), and the fact that a

Land of a  
corporation

11 I R C L 238 247 251 *Leigh v Jack* (1879) 5 Ex D 264 C A *Re Duffy's Estate* [1897] 1 I R 301 C A

(i) *Leigh v Jack* *supra* per COLTON L J at p 214 and per BRAMWELL L J at p 213 see *Re Duffy's Estate* *supra* *Re Vernon's Estate* [1901] 1 I R 1. As examples of what acts do and what do not amount to dispossession see *Norton v London and North Western Rail Co* (1891) 13 Ch D 265 C A per JAMES L J at p 211 *in overruling* *Searby v Tottenham Rail Co* (1868) 1 R 5 Eq 409 *Littledale v Liverpool College* [1900] 1 Ch 19 C A *Kynoch Ltd v Roulunds* (1911) 55 Sol J 61 (strip of land) *Marshall v Taylor* [1895] 1 Ch 641 C A (hedge and ditch) *Seddon v Smith* (1877) 36 L T 168 C A *Haugh v West* [1833] 2 Q B 19 C A (road) *Smith v Stokes* (1861) 38 L J (Q B) 306 (gravel pit) *Beaufort (Duke) v Aird* (1904) 20 F L R 602 *Philpot v Bath* (1905) 21 T I R 634 C A compare *Lord Advocate v Young North British Rail Co v Young* (1881) 12 App Cas 544 553 *Lord Advocate v Blantyre (Lord)* (1879) 4 App Cas 710 191 *Re Vernon's Estate* [1901] 1 I R 1 *Van Diemen's Land Co v Table Cape Marine Board* [1906] A C 92 P C (foreshore) *Thillingsen v Gibbon* (1871) 6 Ch App 428 *Waddington v Naylor* (1889) 60 L T 480 *Stedman v Smith* (1841) 8 I & B 1 (wall) *Bobbett v South Eastern Rail Co* (1882) 9 Q B D 424 see S C [1882] W N 92 C A (coal siding on railway land) *Hindson v Ashby* [1896] 1 Ch 18 87 [1896] 2 Ch 1 C A (dry river bed) *Koster v Warblington Urban Council* [1906] 1 K B 648 611 C A (oyster beds)

(f) *M Donnell v M Kinty* (1841) 10 I L R 514 *Smith v Lloyd* (1854) 9 Exch 562 572 *Agency Co v Short* (1888) 13 App Cas 793 P C *Gibson v Wise* (1881) 35 W R 409

(g) *Agency Co v Short* *supra* see *Willis v Howe (Earl)* [1893] 2 Ch 545 C A *Re Duffy's Estate* *supra*

(h) The discontinuance of an estate tail worked by the tortious feoffment of a tenant in tail was not a discontinuance of possession by the person through whom the issue in tail claimed within the meaning of the statute (see p 109 *ante*) so as to make time begin to run against the issue from such feoffment (*Ritlington v Cannon* (1852) 12 C B 18 33 Ex Ch see *Abergavenny (Earl) v Brace* (1872) L R 7 Exch 145 *Bobbett v South Eastern Rail Co* (1882) 9 Q B D 424)

(i) 8 & 9 Vict c 18

(k) *Bobbett v South Eastern Rail Co* *supra* *Norton v London and North Western Rail Co*, *supra*, *Midland Railway v Wright* [1901] 1 Ch. 738

**Section 4**  
**When Time**  
**begins to**  
**Run**

corporation is prohibited by a local Act from letting or selling any part of an estate except on the fulfilment of certain conditions does not prevent the statute from operating against the corporation (l)

**Dispossession**  
**of subsoil**

**205** The exclusive occupation of a space underground though without knowledge of the owner of the land will give a good title under the statute (m)

**Possession of**  
**mines.**

A person may be in possession of mines without any user of them, while another person is in possession of the surface (n) An owner of land who sells it retaining the minerals though he gives up possession of the surface remains in possession of the mines in such case non user is of itself no abandonment of possession and no matter how long such mines remain unworked by the owner the right is unimpaired so long as they are not worked by anyone else (o) If however the owner of the surface or a stranger works the minerals that amounts to an actual possession by the person working them and a dispossession of the owner of the minerals (p) But persons by working part of mines or opening a particular quarry do not necessarily have possession of the continuous field of minerals or quarries of which the part worked forms a portion (q) The mere wrongful taking of minerals does not amount to taking possession of the mine If a mine is discovered from the surface and held by a different owner no presumption of possession of the whole of the mine arises from the fact of possession of a part (r) It is it seems in each case a question of fact to what extent by actual working of the mines possession has been gained on the one side and lost on the other

Where there has been no severance of title to the minerals

Possession for the statutory period of the surface of land over a tunnel belonging to and used by a railway company gives to the occupier of the surface a title to the surface and so much of what is beneath as is necessary for the enjoyment of the surface subject to the right of the railway company to the tunnel and so much of the underlying overlying and neighbouring strata as is necessary for the due and proper enjoyment of the tunnel (*Midland Railway v Wright* [1901] 1 Ch 738) As to superfluous lands see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 26 *et seq*

(l) *Brighton Corporation v Brighton Guardians* (1880) 5 C P D 368

(m) *Rains v Buxton* (1840) 14 Ch D 537 *Bevan v London Portland Cement Co* (1892) 67 T F 615

(n) See title MINES MINERALS AND QUARRIES

(o) *M Dinnell v M Kinty* (1841) 10 I L R 514 *Smith v Lloyd* (1854) 9 Lxch 562 *Keyse v Powell* (1855) 2 E & B 132 see *Seaman v Vaudrey* (1810) 16 Ves 390 *Adair v Shaftoe* (undated) cited by Lord LLDON LC in *Vorruay v Rowe* (1812) 19 Ves 144 at p 156 *Hodgkinson v Fletcher* (1781) 3 Doug (KB) 81 *Low Moor Co v Stanley Coal Co* (1876) 34 L T 186 C A

(p) *Rich d Cullen (Lord) v Johnson* (1740) 2 Stra 1142 As to minerals under copyhold land see title COPYHOLDS Vol VIII pp 22 *et seq* *Keyse v Inwell supra*

(q) *M Dinnell v M Kinty supra* *Dartmouth (Earl) v Spittle* (1871) 24 L T 61 *Low Moor Co v Stanley Coal Co supra* compare *Wild v Holt* (1842), 9 M & W 672 *Lord Advocate v Wemyss* [1900] A C 48 68

(r) *Dartmouth (Earl) v Spittle supra* per FROTT B at p 68 *Thompson v Hickman* [1907] 1 Ch 560 *Glyn v Howell*, [1909] 1 Ch 666 see *Ashton v, Stock* (1877) 6 Ch D 719

possession of the surface for the statutory period gives a title to the minerals (s)

SECT 4

When Time  
begins to  
Run

**206** If a person enters into possession of land under a lease which is absolutely void and pays no rent this is a discontinuance by the owner of the land and the statute will run against the owner from the time that the possession under the void lease begins (t)

Entry under  
void lease

**207** The seizure *quousque* of copyholds by a lord of a manor (a) is a dispossession of the person entitled to be admitted (b)

Seizure  
*quousque*

**208** An owner who actually occupies land is in possession of it If he does not actually occupy it, but puts someone else in to occupy it for him without creating any kind of tenancy then the owner is equally in possession (c) and he is also in possession and in receipt of the profits of the land if he farms it by a bailiff (d)

What  
constitutes  
possession

**209** The receipt of rent payable by any tenant from year to year or other lessee is as against such tenant or lessee or any person claiming under him but subject to the lease to be deemed the receipt of the profits of the land for the purposes of the Real Property Limitation Acts 1833 and 1874 (e) and receipt of the profits of the land is throughout these Acts (e) treated as equivalent to actual possession (f) If a mortgagee of land on lease receives the rent reserved for twelve years the mortgagor's right to redeem will be barred and the mortgagee will gain a title to the reversion as against the tenant who makes the payment (g)

Receipt of  
profits of  
land

#### (u) Rent

**210** If a person claiming rent or some person through whom he claims has in respect of the estate or interest claimed been in receipt of such rent and has while entitled thereto discontinued such receipt the right is deemed to have first accrued at the last time at which any rent was so received (h) A distress made

Discon-  
tinuance of  
receipt of  
rent

(s) *Seddon v Smith* (1877) 36 I T 168 C A

(t) *Magdalen Hospital (President and Governors) v Knotts* (1819) 4 App Cas 324

(a) See title COPYHOLDS Vol VIII p 57 and see *ibid* pp 52 58

(b) *Walters v Webb* (1870) 5 Ch App 531

(c) See *Peakyn v Peakyn* [1895] 2 I R 359

(d) See Sugden on the Statutes relating to Real Property 2nd ed 47 *Grant v Ellis* (1841) 9 M & W 113 128

(e) 3 & 4 Will 4 c 27 37 & 38 Vict c 57 see Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 35 and see Sugden on the Statutes relating to Real Property 2nd ed 47 For the definition of rent see p 107 *ante*

(f) A demise at will reserving rent is it is submitted a lease within the meaning of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 35 (see the text *supra*) and consequently it seems payment of rent to the reversioner would preserve his title from being barred by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 7 see p 123 *post*

(g) *Ward v Carttar* (1865) L R 1 Eq 29 *Markwick v Hardingham* (1880), 15 Ch D 339 C A

(h) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 Rent here means rent as an inheritance and not rent reserved see p 107 *ante* This provision, in the case of the discontinuance of receipt of rent makes the

**SECT 4**  
**When Time**  
**begins to**  
**Run**

subsequent to the extinguishment of rent is unlawful in every case in which rent is extinguished by the operation of the statute, no arrears accruing due before the day on which the extinguishment takes effect can be recovered after that day because the rent is extinguished as from the day on which the statute began to run, not as from the last day of the statutory period of limitation (2)

To constitute a discontinuance of the receipt of rent there must be an omission by the person entitled in not applying for the rent or neglecting to enforce his remedies with knowledge that payment has not been made (1)

**Payment by**  
**owner of part**  
**of land**  
**subject to**  
**rentcharge**

Where land subject to a rentcharge is divided and comes into the occupation of different persons and the rentcharge is paid by the occupier of one part of the land and the occupier of another part does not make any payment or acknowledgment and is not distrained on for more than twelve years there is no dispossession of the owner of the rentcharge as regards the part in respect of which no payment has been made by the occupier for a rentcharge is entire and issues out of all and every portion of the premises charged (1)

**SUB SECT 2 —Death of or Alienation by Rightful Owner**

**Death of**  
**rightful**  
**owner**  
**while in**  
**possession**

**211** Where the person claiming land or rent claims the estate or interest of some deceased person who has continued in possession or in receipt of the profits of the land, or in receipt of the rent in respect of the same estate or interest until the time of his death, and has been the last person entitled to such estate or interest who has been in such possession or receipt the right of the person claiming is deemed to have first accrued at the time of such death (m)

time begin to run before any right to make an entry or distress or to bring an action has actually accrued (*Owen v De Beauvoir* (1841) 16 M & W 347 *De Beauvoir v Owen* (1840) 11 Exch 166 1x Ch) In that case (where the period was twenty years) the last payment of the rent was on 10th January 1825 six years arrears up to Michaelmas 1844 were distrained for on 13th May 1845 it was held that the distress was unlawful As to disabilities see p 133 *post* as to acknowledgments of title see p 131 *post* as to express trusts see p 139 *post*

(1) In *Owen v De Beauvoir supra* LALKE B at p 365 and in *De Beauvoir v Owen supra* PATTERSON J at p 117 give as the reason for their judgments that rent service having become extinguished no tenure in respect of the rent existed at the time of the distress In the case of a rentcharge or rent sec where the right of distress depends on either contract or statute (see Landlord and Tenant Act 1700 (4 Geo 2 c 28) s 5 Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41) s 44 title DISTRESS Vol XI p 120) it might be argued that this reasoning does not apply but it seems that the principle laid down in *Owen v De Beauvoir supra* applies to every kind of rent as an inheritance see *Re Maunsell's Estate* [1911] 1 I R 271 As to rentcharges generally see title RENTCHARGES AND ANNUITIES

(h) *Adnam v Sandwich (Earl)* (1817) 2 Q B D 485 (where payment by a vendor of the land charged preserved the right against the land) see *Dublin (Archbishop) v Cooté and Trimleston (Lord)* (1849) 12 I Fq R 251 As to title rentcharge see *Irish Land Commission v Junkin* (1888) 24 L R Ir 40, *Irish Land Commission v Ryan* [1900] 2 I R 565 C A and p 109 *ante*

(l) *Woodcock v Titterton* (1864) 12 W R 865 *Conolly v Gorman* [1898] 1 I R 20 C A and see title RENTCHARGES AND ANNUITIES

(n) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 2nd branch This branch applies to persons deriving title under a deceased person whether

If the owner of land dies intestate, and after his death the rents arising out of the land are collected by a person who purports to act as the agent for the heir the statute will not run against the heir so long as the agent receives the rents as agent (*n*) If the owner of land dies having devised it by will and the tenant pays the rent to a person in the belief that such person is acting for the true owner and such person knowing of such belief accepts the rent and the true owner in a reasonable time adopts and ratifies the acts of such person in receiving the rent there is no dispossession of the true owner (*o*)

SECT 4  
When Time  
begins to  
Run

Receipt of  
rents by  
person acting  
as agent

**212** Where the person claiming land or rent claims in respect of an estate or interest in possession granted appointed or otherwise assured by any instrument other than a will to him or some person through whom he claims by a person who was at the time of the assurance in the possession or receipt of the profits of the land or in the receipt of the rent and no person entitled under such instrument has been in such possession or receipt then the right is deemed to have first accrued at the time at which the person claiming or the person through whom he claims became entitled to such possession or receipt by virtue of such instrument (*p*)

Alienation  
by rightful  
owner

**213** The preceding provisions do not control the operation of the Real Property Limitation Act 1874 (*q*) s 1 and every case which plainly falls within the clear and unambiguous words thereof is governed by its provisions although such a case may not come within the provisions of the Real Property Limitation Act 1833 (*r*) s 3 Thus if an annuity charged on land is given by will and the annuitant receives no payment in respect of the annuity for more than twelve years after the accrual of his right to enforce payment of the first instalment of the annuity out of the land he is barred although he does not come within the provisions of the

Real Property  
Limitation  
Act 1874  
s 1 explained  
but not  
controlled by  
Real Property  
Limitation  
Act 1833  
s 3

by devise or otherwise For the case where a settlor is out of possession at the time of his death see p 117 *post* For the definitions of land and rent see pp 106 107 *ante*

(*n*) *Iyell v Kennedy Kennedy v Iyell* (1849) 14 App Cas 437 Neither the Real Property Limitation Act 1874 (31 & 38 Vict c 57) s 1 nor the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 3 has any application to such a case

(*o*) *Iyell v Kennedy Kennedy v Iyell supra Mouliffe v Pittsimons* (1889) 26 L R Ir 29

(*p*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 3rd branch Time does not run unless there has been both absence of possession by the person who has the right and actual possession by someone else to be protected (see cases cited in note (*f*) p 111 *ante*) So if a person who for merely owned both the surface of land and the minerals beneath grants the minerals to someone else and retains possession of the surface and neither the grantee nor anyone else works the minerals time it is conceived would not run against the grantee (but see *Keyse v Powell* (1853) 2 L & B 132)

(*q*) 37 & 38 Vict c 57 see p 109 *ante*

(*r*) 3 & 4 Will 4 c 27 see *James v Salter* (1837) 3 Bing (N c) 544 *Magdalen Hospital (Governors) v Knotts* (1878) 8 Ch D 109 121 O A *Pugh v Heath* (1882) 7 App Cas 230, *Irish Land Commission v Junkin* (1868) 24 I R Ir 40

**SECT 4** **Real Property Limitation Act, 1833, s 3 (s)** The same principle applies where a rentcharge is created by deed (t)  
**When Time begins to Run.**

**SUB SECT 3—Future Estates**

(1) *In General*

When the right accrues.  
 General rule

**214** When the estate or interest claimed is an estate or interest in reversion or remainder or other future estate or interest (a) and no person has obtained the possession or receipt of the profits of the land or the receipt of rent in respect of such estate or interest the right of the person claiming is deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (b) by the determination of any estate or estates in respect of which such land has been held or the profits thereof or such rent has been received notwithstanding that the person claiming such land or rent or some person through whom he claims has at any time previous to the creation of the estate or estates which have determined been in the possession or receipt of the profits of such land or in receipt of such rent (c)

(s) 3 & 4 Will 4 c 27 see *Re Drake's Estate* [1909] 1 I P 136 *James v Salter* (1837) 3 Bing (N C) 244 *Tangton v Langton* (1804) 18 Jur 928 If there is a right to recover the annuity by action (see *Thomas v Sylvestre* (1813) L R 8 Q B 368) time begins to run from the first instalment becoming due if the only right is to distrain it will run when the right to distrain first accrues this may be at a later time than that at which the first instalment becomes due see *James v Salter supra* at p 555 As to an annuity charged on land and secured by express trust see p 141 *post*

(t) As to particular estates in land created by will or deed see *James v Salter supra* at p 554 Sugden on the Statutes relating to Real Property 2nd ed 22

(a) Future estates whether created by deed or will are governed by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 3 4th branch by the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2 (which is substituted for and is an enlargement of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 5) and by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 20

(b) *Ibid* s 3 4th branch Rent here and in the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2 means rent existing as an inheritance and not rent reserved see p 107 *ante* The Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 3 4th branch includes future estates of all kinds including executory limitations (*James v Salter supra*) As to future estates and interests generally see titles REAL PROPERTY AND CHATELS REAL SETTLEMENTS WILLS

(c) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2 This clause of *ibid* s 2 takes the place of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 5 The Real Property Limitation Act, 1874 (37 & 38 Vict c 57) s 2 overrides the provisions of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 4th branch As to the meaning of the Real Property Limitation Act 1874 (3 & 4 Will 4 c 27) s 5 which corresponds to the first part of the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2 see Sugden on the Statutes relating to Real Property 2nd ed 43, 1 Hayes Introduction to Conveyancing 5th ed 200 2 Smith L C 11th ed 668 *Doe d Hall v Mordaunt* (1847) 16 M & W 689 As to the effect as against devisees in remainder of a mortgagor of the mortgagee going into possession see p 149, *post* as to mortgage of a reversionary interest see p 146 *post* as to a legacy charged on a reversionary interest see p 90 *ante*

**215** The person entitled to a future estate has a new right at the time when the preceding estate determines, so that, if the owner of an estate grants or devises out of it a particular estate with a remainder following and the owner of the particular estate takes possession before the time has run against the right of the grantor, the right of the persons entitled in remainder accrues and can be enforced at the determination of the particular estate even if the grantor had discontinued possession before the time of his grant or death (*d*). Though time may be running against the settlor when the settlement is made yet the fact that the grantee of a particular estate takes possession under the settlement reverts the title of all persons entitled to remainders under the settlement as well as that of the settlor and his heirs in reversion. If however twelve years elapse after the dispossession of the grantor without entry into possession by the grantee of the particular estate the persons entitled in reversion or remainder will be barred. For after time has once begun to run, a person cannot by putting his estate into settlement raise up new rights and give new claims to persons deriving under the settlement (*e*). The effect of the statute must always be determined with reference to the actual state of the title when time begins to run and when time has once commenced to run no subsequent alteration in the title will postpone the bar (*f*).

**SECT 4**  
**When Time begins to Run**

Effect of settlement by person out of possession

**216** If the person last entitled to any particular estate on which any future estate or interest was expectant (*g*) was not in possession at the time when his interest determined no entry nor distress is to be made and no action is to be brought by any person becoming entitled in possession to a future estate or interest but within twelve years from the time when the right to make an entry or distress or to bring an action first accrued to the person whose interest so determined or within six years from the time when the estate of the person becoming entitled in possession has become vested in possession whichever of these two periods is the longer (*h*).

Effect of owner of particular estate being out of

(*d*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) s 3 4th branch  
Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2

(*e*) *Stackpole v Stackpole* (1843) 4 Dr & War 320 per SUGDEN LC at p 347 As to the case where the settlor is in possession at his death see p 113 ante

(*f*) 1 Hayes Introduction to Conveyancing, 5th ed 201 Sugden on the Statutes relating to Real Property 2nd ed 38 If the rightful owner seised in fee is dispossessed the person in actual possession for the statutory period must at the end of such period be safe from the claims of the rightful owner and all persons claiming under him consequently a title depending upon the statute may be forced upon a purchaser see *Scott v Nixon* (1843) 3 Dr & War 388 *James v Linnor* (1854) 24 F J (CH) 517 O A 1 Dart Vendors and Purchasers 6th ed 462 but see *Jacobs v Revell* [1900] 2 Ch 808

(*g*) These words do not apply to a reversion in fee expectant on the determination of a lease for years or lives The words apply to future estates created by the owner of such a reversion but not to the reversion itself (*Walter v Yalden* [1902] 2 K B 304)

(*h*) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2 Thus where a particular estate has been created with a reversion or remainder expectant on its determination if a person without title obtains possession



## SECT 4

**When Time  
begins to  
Run**Successive  
remaindersPossession by  
grantee of  
tenant for  
life

If there is a series of remainders limited to take effect in succession each remainderman has six years to bring his action, after his own estate becomes an estate in possession though another person may have been in possession without title for twelve years (i)

Where a tenant for life conveys property and the grantee is in possession under the conveyance the tenant for life is not "the person last entitled" within the meaning of the above provision and the remainderman may bring his action within twelve years after the death of the tenant for life and is not limited to twelve years from the grantee's taking possession or to six years from the grantor's death (k)

Settlement  
by reversioner  
or remainder  
man

**217** If a reversioner or remainderman settles his estate after the statute has begun to run against the person entitled to the particular estate in possession the title of all persons claiming under this settlement will be barred if and when the settlor of the reversion or remainder would be barred (l)

Merger of  
particular  
estate in  
reversion

**218** If a tenant for life while time is running against him surrenders his estate to the remainderman, the remainder is accelerated by the merger of the two estates and so falls into possession and time will begin to run against the remainderman from the date of the surrender and not from the death of the tenant for life (m). If in similar circumstances the remainderman conveys his remainder to the tenant for life the latter thus acquires a new right in respect of such estate which will be barred in twelve years from the time when the statute began to run against the life estate or in six years from the date of the conveyance by which the tenant for life acquires the remainder whichever period is the longer (n).

Conveyance  
by tenant for  
life and  
remainder  
man

If while time is running against the tenant for life the tenant for life and remainderman concur in conveying the property by way of settlement creating particular estates and remainders and

during the existence of this particular estate and remains in possession for twelve years not only is the owner of the particular estate barred at the end of that time but the reversioner or remainderman is also barred unless he brings his action within six years of the time when his reversion or remainder becomes an estate in possession. So if an owner in possession creates an estate for life with remainders over and the tenant for life is disposed of and dies after being four years out of possession the remainderman has eight years from the death of the tenant for life to bring his action. But if the tenant for life has been out of possession more than six years at the time of his death the remainderman will not be barred until six years from the death.

(i) *Re Deion's (Bart)* Settled Estates *White v Deion* (1851) *Re Beer Steer v Dolell* [1896] 2 Ch 562

(k) *Pedder v Hunt* (1865) 18 Q B D 560. In such a case the grantee of the life estate is the person last entitled (*ibid* at p 560).

(l) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2 second part of second clause. This provision does not apply if the settlor dies before his remainder falls into possession.

(m) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 4th branch see p 116 *ante*

(n) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 2

some of these estates are of such a nature that they are commensurate with and must take effect out of the estate of the tenant for life only and all the rest must take effect out of the remainderman's estate the owners of the former class of estates may be considered as claiming through the tenant for life only and the owners of the latter class as claiming through the remainderman only and time would run against their respective interests accordingly If however the resettlement creates an estate in remainder which takes effect out of the estates of the tenant for life and remainderman jointly the statute will, it seems not begin to run until the new estate in remainder takes effect in possession as until then the merger of the two estates through which the new estate takes effect does not take place (o)

SECT 4  
When Time  
begins to  
Run

**219** If a lease is surrendered (a) and a new lease granted contemporaneously to the lessee the reversion must be considered as falling into possession at the time of the renewal of the lease If a person without title has during the currency of the old lease obtained possession of the demised premises or any part thereof a right of action accrues to the reversioner at the time of the renewal and the statute runs against him from that time (b)

Reversion on  
a lease

If there is no surrender and the lease determines by effluxion of time and a trespasser is in possession of the demised premises time begins to run against the reversioner from the expiration of the lease and the grant by him of a fresh lease cannot avail him as against the trespasser if there is no possession against the trespasser under the fresh lease (c) If a trespasser has during the currency of the lease acquired a title under the statute against the lessee the right of the lessor to bring ejectment against the trespasser accrues on the determination of the lease (d)

When  
reversion is  
barred

**220** If a tenant in tail conveys to a stranger by an assurance which is ineffectual to bar the issue and possession is taken under

Conveyance  
by tenant in  
tail

(o) See *Doe d Curzon v Edmonds* (1840) 6 M & W 295 If a tenant for life and remainderman join in a conveyance or resettlement when the tenant for life has been so long out of possession that the statute has run against him then the grant of the tenant for life can have no effect as his title is already extinguished and time runs against estates taking effect out of the remainder as if the remainderman had aliened an estate in remainder expectant on the determination of the life estate

(a) As to surrender of a lease see title LANDLORD AND TENANT Vol XVIII pp 546 *et seq*

(b) *Ecclesiastical Commissioners of England and Wales v Roue* (1880) 5 App Cas 736 distinguishing *Corpus Christi College Oxford v Rogers* (1879) 49 I J (Q B) 404 see *Ecclesiastical Commissioners for England v Irceimer* [1893] 1 Ch 166 *East Stonehouse Urban Council v Hallowhby Brothers Ltd* [1902] 2 K B 318 and see title LANDLORD AND TENANT Vol XVIII pp 549-550 note (a) If the trespasser has acquired a title under the statute as against the lessee the surrender of the lease will be ineffective as against the trespasser and the lessor will have no right of entry against the trespasser on the surrender but time will not run against the lessor until the expiration of the term fixed by the original lease (*Walter v Yalden* [1902] 2 K B 304) and see the text *infra*

(c) See *Kennedy v Woods* (1868) 2 I R O L 436 Ex Ch As to the effect of payment of rent to a person wrongfully claiming the reversion, see p 126 *post*

(d) *Walter v Yalden supra*

**SECT 4**  
**When Time**  
**begins to**  
**Run**

Future estates  
 in case of  
 husband and  
 wife.

such assurance the right of the issue or remainderman to enter on the death of the tenant in tail is a 'future estate' within the meaning of the statute (e)

If land is limited to a husband and wife for their lives, with remainder to the husband in fee the right of the husband and his heirs on the death of his wife is also such a "future estate" (f) So, also in cases not governed by the Married Women's Property Act 1882 (g) is the right of a wife or her heirs to enter on her property on the death of her husband when he has conveyed it to another by an assurance not binding on her (h) but if a husband and wife simply discontinue the possession of her property then subject to the question of disabilities time runs against the wife and her heirs from the time when the possession is discontinued and no fresh right accrues on the death of the husband (i) In such a case no fresh right accrues to the husband on the death of the wife in respect of the curtesy as a tenant by the curtesy is considered as claiming through the wife (j)

(n) *Owners p by One Party of Particular and Future Estates*

When future  
 estate is  
 barred

**221** If a right to a particular estate in possession has been barred the right of the owner of such estate or of anyone claiming through him to any future estate or interest to which such owner was or became entitled at any time while the statute was running against the particular estate is barred at the same time but if in the meantime some person entitled to a particular estate subsequent to to the one barred has obtained possession the bar is removed as regards the future estate (l) The right to the future estate is however not barred unless the person entitled to the estate in possession becomes entitled to the future estate before the estate in possession has been barred Further the right to the future estate is not barred unless the particular estate in possession has been actually barred and such right is unaffected if the particular estate determines before the prescribed period has run out (m)

Ouster of  
 tenant for life  
 by succeeding  
 tenant for life

**222** If a tenant for life is ousted not by a stranger but by a succeeding tenant for life who retains possession for more than

(e) *I.e.* the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 4th branch see p 116 *ante* *Cannon v Rimington* (1802) 12 O B 1 As to when assurances by a tenant in tail do not bar issue see title REAL PROPERTY AND CHATTELS REAL

(f) *Doe d Johnson v Liversidge* (1843) 11 M & W 51,

(g) 45 & 46 Vict c 75 see title HUSBAND AND WIFE Vol XVI pp 322 *et seq* 348 *et seq*

(h) *Jumpsen v Pritchers* (1843) 13 Sim 527

(i) *Doe d Corbun v Bramston* (1835) 3 Ad & El 63

(k) See Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 1 and see p 109 *ante*

(l) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 20 *eg*, if there are two successive tenants for life with remainder to the first in fee and on the bar of the estate of the first tenant for life the second tenant for life recovers possession the property would on the death of the second tenant for life pass to the persons claiming under the first tenant for life It is immaterial how the possession of the person entitled to a particular estate is obtained (*Doe d Johnson v Liversidge supra*)

(m) *Doe d Johnson v Liversidge supra* Sugden on the Statutes relating to Real Property 2nd ed, 50

twelve years during the lifetime of the first tenant for life and then survives him and retains possession the right of the persons claiming an estate in remainder to which the ousted tenant for life was entitled will be preserved by the possession of the second tenant for life after the death of the first and such persons will have twelve years from the death of the second tenant for life to assert their right just as if the first tenant for life had been ousted by a stranger and the right of the remainderman had been preserved by the entry of the second tenant for life (n)

SECT 4  
When Time  
begins to  
Run.

**223** If a tenant for life has a power of appointment in remainder after the determination of remainders expectant on the determination of his life estate and at his death time has run against his life estate the exercise of his power of appointment by will is not affected (o)

Power of  
appointment

**224** If an estate *pur autre vie* and the reversion expectant on the determination of such estate become vested in the same person and he does not take possession then even though no merger may take place he or anyone claiming through him is barred at the end of twelve years from the time when the two estates became vested in him (p)

Particular  
estate and  
reversion  
vested with  
out merger

**225** If land is devised to a person subject to a gift over on the happening of either of two events and both events happen time runs from the happening of the first event and an action brought more than twelve years after the happening of the first event but less than twelve years after the happening of the second event, is barred (q)

Devise  
subject to  
conditions

#### SUB SECT 4 — Forfeiture and Breach of Condition

**226** Where the person claiming land or rent (r) or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition the right is deemed to have first accrued when the forfeiture was incurred or the condition broken (s) But where such right is in respect of any estate in reversion or remainder and the land or rent has not been recovered by virtue of such right, the right is deemed to have first accrued in respect of such estate at the time when the estate became an estate in possession as if no such forfeiture or breach of condition had happened (t)

When time  
begins to run

**227** Although no rent has been paid for upwards of twelve years

Right of  
reversioner in  
case of lease

(n) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 20 *Doe d Johnson v Liversedge* (1843) 11 M & W 517 and see note (l) p 120 *ante*

(o) *Re Devon s (Earl) Settled Estates White v Devon (Earl) Re Steer Steer v Dobell* [1896] 2 Ch 568 The appointees in such a case will not be barred under the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 20

(p) *Doe d Hall v Mouldsdales* (1847) 16 M & W 689 see *Fooks v Griffith* (1864) 15 I O L R 239 Ex Ch *per* PIGOT CB at p 292

(q) *Clarke v Clarke* (1868) 2 I R O L 390 following *Doe d Hall v Mouldsdales supra* compare *Asley v Essex (Earl)* (1874) 1 R 16 Eq 290 and see p 122 *post*

(r) For the definitions of "land" and "rent," see pp 106 107 *ante*

(s) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27), s 3 5th branch,

(t) *Ibid*, s 4

**SECT 4**  
**When Time**  
**begins to**  
**Run**

General  
application of  
provisions

before the expiration of a lease the reversioner has notwithstanding, twelve years from the determination of the lease in which to recover possession (a) and the rule is the same even if the lease contains a proviso for re entry on non payment of rent (b)

**228** The preceding provisions apply to every forfeiture or breach of condition and not merely to cases between landlord and tenant (c), so the right of the remainderman is preserved where by the terms of a conditional limitation on the breach of a condition the previous estate is expressed to come to an end and the estate of the remainderman to fall into possession (d)

**SUB SECT 5 —Administration**

When  
administra-  
tor's right  
accrues

**229** For the purposes of the Real Property Limitation Acts 1833 and 1874 (e) an administrator claiming the estate or interest of his intestate is deemed to claim as if there had been no interval of time between the death and the grant of the letters of administration (f) Time therefore runs against the right of an administrator to an estate or interest in reversion or remainder from the time when the estate or interest becomes an estate or interest in possession as it always does as against an executor (g)

(a) See p 11, *ante* *Doe d Davy v Oxenham* (1810) 7 M & W 131 As to recovery of possession by a landlord against his tenant see title LANDLORD AND TENANT Vol XVIII pp 506 *et seq*

(b) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 4 In such a case the omission to enforce one forfeiture does not prejudice the right to enforce a subsequent one and as the lease remains in existence until a forfeiture is actually enforced a fresh right to enter accrues and therefore time begins to run afresh every time a fresh default in payment is made There is it is believed no express authority on this point in England The decision to the contrary effect in Ireland in *Doe d Mannion v Bingham* (1841) 3 I R 456 is inconsistent with *Ciant v Illis* (1841) 9 M & W 113 (see p 10 *ante*) and has been overruled in Ireland (see *Sj ratt v Sherlock* (1853) 3 I C I R C)

(c) *Doe d Hall v Mouldale* (1841) 16 M & W 696 and see *Whit n v Peacock* (1834) 3 My & K 375 (copyholds) *Doe d Cook v Danvers* (1806) 7 East 299 *Doe d Allen v Blakeway* (1833) 5 C & P 563 As to forfeiture in the case of landlord and tenant see title LANDLORD AND TENANT Vol XVIII pp 530 *et seq* and as to forfeiture generally see further titles COPYHOLDS Vol VIII pp 46 *et seq* REAL PROPERTY AND CHATELS REAL

(d) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 4 *Astley v Fesser (Lair)* (1844) 1 R 18 Lq 290 *Cnnolly v Leahy* [1899] 2 I R 344 compare *Clarke v Clarke* (1866) 21 R C L 395 and see p 121 *ante* As to the period of limitation in respect of a lord's right to seize copyhold *quousque* see title COPYHOLDS Vol VIII pp 52 58

(e) 3 & 4 Will 4 c 2 37 & 38 Vict c 57

(f) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 6 As to the law before this Act see *Sanders v Stanford* (1519) cited in *Saffyn v Adams* (1605) Cro Jac 60 61 *Janclain v Little* (circa 1820) cited in *Murray v East India Co* (1821) 5 B & Ald 213 214 *Murray v East India Co supra*

(g) *Re Scott and Alvares Contract* *Scott v Alvares* [1895] 1 Ch 596 605 C A The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 6 applies for all the purposes of the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 27) and 1874 (37 & 38 Vict c 57) and is not merely a proviso to the provisions immediately preceding it See cases cited in title EXECUTORS AND ADMINISTRATORS Vol XLV p 230 note (h) compare *Holland v Clark* (1842) 1 Y & O Ch Cas 101 110

SUB SECT 6 — *Tenancies at Will*

## SECT 4

When Time  
begins to  
RunWhen lessor's  
right accrues

**230** Where any person is in possession or in receipt of the profits of any land or in receipt of any rent as tenant at will, the right of the person entitled subject to such tenancy or of the person through whom he claims is deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy (*h*)

**231** An admission by an occupier that his occupation is permissive is evidence to show that the occupation is permissive but not to show when the tenancy began nor does it operate in any way to set the statute running afresh the effect is simply to postpone the bar of the statute for one year beyond the time at which it would have taken effect if the occupation had been that of a trespasser (*i*)

Admission by  
occupier of  
nature of  
tenancy

**232** The leaning of the courts is always to construe tenancies for an undefined period reserving yearly rents as tenancies from year to year where the parties do not express an intention to the contrary but they may agree to create a tenancy at will with a rent reserved (*l*) so that every time rent is paid the lessor at will and not the lessee at will is as between themselves in the receipt of the profits of the land for the purposes of the statute (*l*)

Tenancy at  
will reserving  
rent

**233** If a person without apparent title who is in possession of land gives an acknowledgment by payment to the owner the payment may prevent time running either as proof that the person is in occupation as tenant at will paying rent or that a former tenancy at will has been determined and a new one created (*m*)

Acknowledg-  
ment by  
payment

(*h*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 7 For a case where this provision was applied see *Brighton Corporation v Brighton Guardians* (1890) 5 Q 1 D 368 The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 7 is a necessary supplement to *ibid* s 2 (now the Real Property Limitation Act 1845 (31 & 32 Vict c 36) s 1) The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 2 does not apart from *ibid* s 7 apply to tenancies at will because the lessor at will could not bring ejectment until he had determined the possession of the tenant at will by demand of possession or otherwise (*Harrard v Lucif* (1819) 8 C B 231 251 *Right d Lewis v Bearl* (1811) 13 East 210) see title LANDLORD AND TENANT Vol XVIII p 436 As to how a tenancy at will may be determined see *ibid*

(*i*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 1 compare *Doe d Groves v Groves* (1847) 10 Q B 196 Acknowledgments in writing or by way of payment (see p 131 *post*) stand on a different footing If a person has been in possession of land for more than twelve years but within twelve years before action a letter is written by his agent to the original owner's agent offering to accept a lease of the land in question such a letter if it does not amount to an acknowledgment in writing within the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 14 (see p 131 *post*) is admissible in evidence against the occupier and is evidence of a tenancy at will but is no evidence as to the time when such tenancy began (*Ley v Peter* (1854) 3 H & N 101)

(*h*) *Doe d Bastow v Cox* (1841) 11 Q B 122 see *Rushdison v Langridge* (1811) 4 Taunt 128 and title LANDLORD AND TENANT Vol XVIII pp 435 440 443

(*l*) See the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 7 see *Hodgson v Hooper* (1860) 3 L & E 149 As to receipt of rent being receipt of profit, see p 113 *ante*

(*m*) See p 132 *post* *Quere* whether such payment could have any effect if made after the expiration of thirteen years possession without payment

## SECT 4

When Time  
begins to  
RunEntry under  
void leaseOr invalid  
conveyanceRunning of  
time when a  
tenancy at  
will is  
determinedEffect of  
owner enter-  
ing on land  
from time to  
time

**234** If a person enters on land under a lease which is invalid by the Statute Frauds (n) a tenancy at will is created (o). If however, a person enters on land under a lease which is void *ab initio*, and pays no rent such person is not tenant at will but is in possession without any title and the statute runs in his favour from the date of his entry but if any rent however small is reserved by the lease and paid by him the statute will not run as long as such payment is made (p).

A purchaser taking possession under a conveyance invalid for non enrolment is a tenant at will within the statute (q).

**235** If a tenancy at will is determined within a year from its commencement and no fresh tenancy is created time runs from the determination. If a tenancy at will is actually determined before the expiration of thirteen years from its commencement and a new tenancy at will is created time begins to run afresh and the period of limitation must be reckoned with reference only to the last tenancy at will created before the question of title is raised (r). So if a tenancy at will is thus determined within thirteen years, and the lessor actually takes possession even if only for a moment and the tenant resumes possession without any new tenancy being created, the statute runs from the day on which the person who was tenant resumes possession for from that day he is a mere trespasser. But if in such a case the lessor does not actually take possession when he determines the tenancy at will time does not run from his determination but from one year after the commencement of the tenancy at will (n).

If the owner of a house allows someone else to occupy it for the statutory period but from time to time during that period comes and lives in the house with the tenant at will the inference may be drawn that every time the owner comes to live there he determines the existing tenancy and creates a fresh tenancy and the statute will only begin to run from the time of his last departure (b).

(n) 29 Car 2 c 3 1

(o) *Go dale v Gallaway v Herbert* (1792) 4 Term Rep 650 see title LANDLORD AND TENANT Vol XVIII p 435 As to the rule with regard to encroachments see *ibid* p 562

(p) *Magdalen Hospital (President and Governors) v Knotts* (1879) 4 App Cas 374, per Lord SELBORNE at p 335 *Bunting v Sargant* (1859) 13 Ch D 300 and see title LANDLORD AND TENANT Vol XVIII p 440

(q) *I.e.* the Real Property Limitation Act 193 (3 & 4 Will 4 c 27) s 7 see *Lea Moor Co v Stanley Coal Co* (1856) 34 I T 186 C A see *Doe v Stanway v Rock* (1842) 4 Man & G 30

(r) *Turner v Doe v Bennett* (1842) 9 M & W 643 Ex Ch *Doe v Goody v Carter* (1841) 9 Q B 863 *Doe v Stanway v Rock* *supra* *Hidgson v Hooper* (1860) 3 E & B 149 *Randall v Stevens* (1853) 2 E & B 641 *Locke v Matthews* (1863) 13 O B (N S) 103

(a) *Doe v Bennett v Turner* (1840) 7 M & W 226 *Turner v Doe v Bennett* *supra* *Locke v Matthews* *supra* per FRIE CJ at p 761 *Doe v Goody v Carter* *supra* *Day v Day* (1811) L R 3 P O 701 *Wimbledon and Putney Commons Conservators v Nicol* (1894) 10 T L R 247 The doubts expressed on this point by the Court of Queen's Bench in *Randall v Stevens* (1853) 2 E. & B 641 652 and in *Locke v Matthews* *supra* per WILLES J at p 766 may now be disregarded. As to what is taking possession see *Doe v Baker v Coombes* (1850) 9 O B 114 see *Worsam v Vandenberg* (1868) 17 W R 53

(b) *Doe v Groves v Groves* (1847) 10 Q B 486 There may be cases of this

If a person is allowed to occupy land by the permission of the owner, who comes from time to time on the land and tells the occupier what trees to lop and what repairs are required then every time the owner sets foot on the land time will begin to run afresh (c). But the mere fact that the landlord enters the premises without objection on the part of the tenant at will for the purpose of doing repairs does not amount to a determination of the tenancy so as to interrupt the acquisition of a title by the tenant (d). Acts of ownership which would be sufficient to show a determination of an existing tenancy at will (e) and the creation of a new one if the occupation is permissive do not necessarily amount to evidence against the occupier that his holding is permissive. In such a case if there is no proof *abundant* that a tenancy at will was in existence at the time of such acts they would have no effect in preventing the operation of the statute but would be ineffective as mere entries (f).

SECT 4  
When Time  
begins to  
Run.

Evidence of  
permissive  
occupancy.

236 There are cases in which though the occupier is in possession by the will of the owner his occupation is not an independent possession by him but the possession of the owner himself so that the owner is in possession through the occupier such cases may arise where the occupier is a servant of the owner and merely occupies in his capacity of and for the purpose of performing his duties as such servant (g) or where the occupier is a mere guest of the owner (h).

Owner in  
possession  
though not in  
occupation

237 For the purposes of the Real Property Limitation Act 1833 (i) s 7 no mortgagee nor *cestui que trust* is to be deemed to be a tenant at will to his mortgagee or trustee (j).

*Cestui que  
trust* and  
mortgagor

A *cestui que trust* in possession is still tenant at will to his trustee for all other purposes but it is not necessary that any active steps should be taken by a trustee to prevent his estate from being destroyed as in the case of an ordinary tenancy at will by mere lapse of time (k). If however some *cestui que trust* are in possession to

*Cestui que  
trust*

kind where the actual occupier has no independent possession and the owner is by his occupation in possession throughout see the text *infra*.

(c) *Allen v England* (1862) 3 F & F 49

(d) *Lynes v Snaith* [1899] 1 Q B 486

(e) See title LANDLORD AND TENANT Vol XVIII pp 436 437

(f) See Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 10 *Brassington v Llewellyn* (1858) 27 L J (EX) 297 and see p 129 *post*

(g) *Ellis v Lessee v Crawford* (1642) 5 I L R 402 *per* PENNEFATHER B at p 404 *Moore v Lessee v Doherty* (1843) 5 I L R 449 (schoolmaster) *Jac v Walsh* (1842) 4 I L R 254 and see titles LANDLORD AND TENANT Vol XVIII p 340 MASTER AND SERVANT As to occupation by the master see *Brooks v Baker* (1905) 1 Smith Reg Cas 465 As to occupation by a mere licensee see *Wimbledon and Putney Commons Conservators v Nicol* (1884) 10 T L R 247

(h) *Peakyn v Peakyn* [1895] 2 I R 359 distinguishing *Doe d Dayman v Moore* (1846) 9 Q B 555 As to the doctrine of adverse possession see p 105 *ante*

(i) 3 & 4 Will 4 c 27

(j) *Ibid* s 7 For circumstances in which such persons are deemed to be tenants at will see titles LANDLORD AND TENANT Vol XVIII, p 434 notes

(c) (d) MORTGAGE As to mortgages see also p 145 *post*

(k) *Garrard v Tuck* (1849) 8 O B 231 253 *Knight v Bowyer* (1858) 2 De G & J 421, C A, *Doe d Jacobs v Phillips* (1847) 10 Q B 130 see *East Stonehouse*



**SECT 4**  
**When Time**  
**begins to**  
**Run.**

the exclusion of the others and the trustees the *cestui que trustent* in possession will acquire a title (f) If a *cestui que trust* is not in actual occupation but is only allowed to receive the rents or other wise deal with the estate in the hands of occupying tenants and if in such case the actual occupier is permitted to occupy for more than twelve years without paying rent the trustees will lose their title (a)

Only express  
trusts in  
cluded

The statutory provision (b) with regard to *cestui que trustent* relates only to express or actual direct trusts it does not relate to implied trusts or such possible eventual trusts as may if certain facts are established in evidence be declared in a court of equity (c) If, however a person is tenant at will in law but has a right in equity to a lease the right of the landlord will not be barred by the provision (d)

Tenant at will  
with right to  
lease

**SUB SECT 7 — Tenancies from Year to Year or other Period without**  
*Lease in Writing*

When lessor's  
right accrues

**238** Where any person is in possession or in receipt of the profits of any land or in receipt of rent (e) as tenant from year to year or other period without any lease in writing the right of the person entitled subject thereto or of the person through whom he claims is deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent (f) payable in respect of such tenancy has been received, whichever event last happens (g)

*Urban Council v Widdugly Brothers Ltd* [1902] 2 K B 315 compare *Re Cussons Ltd* (1901) 73 I J (CH) 296 and see title TRUSTS AND TRUSTEES

(b) *Burroughs v M Creight* (1811) 1 Jo & I at 290 *Lolling v Hobday* (1882) 31 W R 9 *Re Cussons Ltd supra*

(a) *Mellung v Leil* (1800) 1 C 1 602 669 and see title LANDLORD AND TENANT Vol XVIII p 434 note (d)

(b) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 7 proviso

(c) *Drummond v Sart* (1871) 11 6 Q B 65 *Saults to Homjson* (1880) 29 Ch D 614 *Locking v Parker* (1872) 6 Ch App 30 *Re Cussons Ltd supra* and see title TRUSTS AND TRUSTEES

(d) See p 139 *post* and *Warren v Murray* [1891] 2 Q B 615 C A

(e) *Re rent as an inheritance* see p 101 *ante*

(f) *Re rent reserved* see p 107 *ante* *Baines v Lumley* (1868) 16 W R 614 title LANDLORD AND TENANT Vol XVIII pp 464 465

(g) Real Property Limitation Act 1833 (3 & 4 Will 4 c 24) s 8 which includes all case of tenancies for a recurring period which are not under a lease in writing and the words without any lease in writing apply to a person holding as tenant from year to year as well as to a person holding for any other period A tenancy from year to year or any other tenancy for a recurring period created under a lease in writing is governed not by *ibid* s 8 but by the clauses of the Act dealing with leases and reversions (see p 127 *post*) A lease in writing to come within the exceptions in the Real Property Limitation Act 1833 (3 & 4 Will 4 c 24) s 8 must be an instrument in writing which operates as a lease and passes an interest and must be binding on the lessor a writing which is evidence of the terms of the holding or which binds the tenant only is not sufficient (*Doe d Lansdell v Gower* (1801) 17 Q B 389 see Sugden on the Statutes relating to Real Property 2nd ed 61) As to the position of a tenant holding under an agreement for lease of which specific performance would be decreed see title LANDLORD AND TENANT Vol XVIII pp 366 367 385 440 note (s) As to the position of a person who enters into possession and pays rent under a lease void *ab initio* thus becoming a tenant from year to year, see *Webster v Southey* (1887) 36 Ch D 9 see also title

**239** Where a certain sum is due periodically from a tenant from year to year by way of rent (*h*) and it is proved that a similar sum has been paid from time to time such payments will not prevent time running unless they were made as rent (*i*)

If a sub tenant who is in possession of land pays without compulsion to the superior landlord the rent due from the mesne tenant such a payment of itself does not amount to a payment of rent to the mesne tenant unless there are facts to show that the sub tenant paid the rent by some arrangement with his immediate landlord (*k*) If an action of ejectment is brought to recover land from a person who is in possession, and the plaintiff proves that another person paid rent within twelve years and that the defendant within twelve years had admitted that he held as tenant to the person who paid the rent but there is no evidence of payment of rent by the defendant to anyone the plaintiff is entitled to recover on the ground that an undertenant cannot be permitted to dispute a title which is valid against the person of whom he holds (*l*)

If a person originally receives rent as agent for the true owner and continues to receive it but for more than twelve years pays nothing over to the true owner payment of rent to such a person is payment to the true owner until it is proved that the character in which such person received the rent was changed (*m*)

**SECT 4**  
**When Time**  
**begins to**  
**Run**

Payment of  
rent  
Payment of  
head rent  
by sub tenant

Agent for  
owner  
receiving  
rent

#### SUB SECT 8—*Leases in Writing*

**240** Where land has been demised for a term of years at a rent reserved the title of the landlord to the reversion expectant on the lease is unaffected by the mere fact that the tenant omits to pay rent for any number of years during the existence of the lease (*n*) even if the tenant himself claims the reversion (*o*) In the case of a tenancy from year to year under a lease in writing the non payment for many years of rent reserved coupled with

Effect of  
non payment  
of rent

LANDLORD AND TENANT Vol XVIII pp 410 441 Where a tenant under a void lease occupied land for more than twelve years without paying rent and then paid some arrears of rent it was held that the reversioner's title was not barred (*Bunting v Sarjent* (1819) 13 Ch D 330 per JESSIE M R at p 333)

(*h*) As to the nature of rent reserved see title LANDLORD AND TENANT Vol XVIII pp 464 *et seq* compare the definition of rent given at p 107 *ante*

(*i*) *A G v Stephens* (1800) 6 De G M & G 111 per Lord CRANWORTH I C at p 136 Payment of rent may be proved by parol admission of tenant (*Doe v Spencer (Earl) v Beckett* (1543) 4 Q B 601)

(*k*) *Grogan v Regan* [1902] 2 I R 196 C A As to underleases generally see title LANDLORD AND TENANT Vol XVIII pp 406 *et seq*

(*l*) *Doe v Spencer (Earl) v Beckett supra* and see titles ESTOPPEL Vol XIII pp 402 403 LANDLORD AND TENANT Vol XVIII pp 406 473

(*m*) *Smith v Bennett* (1874) 30 L T 100 *A G v London Corporation* (1860) 2 Mac & G 24; see *Lyell v Kennedy Kennedy v Lyell* (1889) 14 App Cas 43; *Re Hobbs Hobbs v Wade* (1887) 36 Ch D 533 *M Auliffe v Fitzsimons* (1889) 26 L R Ir 29 and title LANDLORD AND TENANT, Vol XVIII p 472

(*n*) See p 121 *ante*

(*o*) *Archbold v Scully* (1861), 9 II L Cas 360

- Section 4**  
**When Time begins to Run**  
 absence of proof of any rent being demanded is of itself evidence from which the determination of the tenancy may be inferred. In such a case to establish a defence resting on the statute the occupier must prove that such length of time had elapsed without payment or demand of rent as to warrant the inference that the tenancy had been determined twelve years or more before action (p)
- Rent reserved paid to wrongful claimant**  
**241** Where, however a tenant holding land or rent of inheritance under a lease in writing which reserves a rent of 20s or upwards pays the rent so reserved, not to the person rightfully entitled to the reversion but to a wrongful claimant and no payment in respect of the rent reserved by such lease is afterwards made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (a), subject to such lease or of the person through whom he claims is deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming and not upon the determination of the lease (b)
- Receipt for less than twelve years**  
 If a person wrongfully claiming the reversion receives rent (c) for a period less than twelve years and then ceases to receive the rent (c) and makes no claim to receive it then, although the rightful owner does not receive rent (c) for twelve years, he will not be barred (d)
- Rent less than 20s**  
 Where there is a valid lease in writing and there is not an annual rent amounting to 20s received neither the receipt of rent by a person wrongfully claiming the reversion nor his obtaining actual possession of the land will prevent the reversioner's right of entry from accruing at the expiration of the lease (e)
- Possession by wrongful claimant during term**  
**242** If no rent is paid to a wrongful claimant but a person during the currency of the lease gets possession and claims to be entitled to the fee time will run against the reversioner only from the determination of the lease (f). Where however within twelve years of the expiration of the lease the rent has been received by a person wrongfully claiming the reversion who also obtains possession of the land at the expiration of the lease, and returns it till the period of twelve years is completed from his first receipt of rent the title of the rightful reversioner will be barred, his right to recover possession being deemed to have

(p) *Stagg v Wyatt* (1836) 2 Jur 892 *Jackson v M Massey* (1890) 26 L R Ir 160 C A and see title LANDLORD AND TENANT Vol XVIII, p 455 compare *Molony v Molony* [1891] 2 I R 1 *Mulcaire v Lane Joynt* (1893) 32 L R Ir 683 C A

(a) *I.e.* rent as an inheritance see p 107 *ante*

(b) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s. 9 As to the law on this point before the Act see *Dredge v Duners* (1806) 7 East 299, 20 *Bushby v Dixon* (1814) 3 B & C 298, 301 *Hovenden v Annesley* (Lord) (1806) 2 Sch & Lef 60, 624, 625 *Tyler v Atkyns v Horde* (1757) 1 Burr 60 H L 2 Smith I C 11th ed 689

(c) *I.e.* rent reserved see p 10, *ante*

(d) See *Agency Co v Short* (1868) 13 App Cas 793 P C and p 111, *ante*

(e) See Law of Real Property Commissioners First Report, 1829, 47,

(f) *Chadwick v Broadwood* (1840) 3 Beav 308, 316

accrued at the time of the first receipt of rent by the wrongful claimant (g)

\* 243 The receipt of rent by a person other than the reversioner will not cause time to run unless the claim of such person is wrongful and adverse to the rightful reversioner (h) So if a small part of the land out of which the rent under the lease issued is conveyed to another person, and the rent is never apportioned, and the whole of the rent is paid as before to the original reversioner, time does not begin to run against the person to whom the small part was conveyed until the lease expires (i)

The words 'wrongfully claiming' (h) refer not only to an intentional and improper claim of the rent but also to a claim made by mistake and to the case of any person not entitled who makes a claim to the rent against a person who is entitled. Thus if a person receives the rents of property to which he is entitled but by mistake accounts for them to another person who is not entitled the receipt of the rents by such other person is a receipt by a person "wrongfully claiming" to be entitled (i)

244 If land is in the occupation of a sub tenant who pays the head rent to the superior landlord, but nothing is either received or paid by the mesne lessee then it seems the receipt of rent by the superior landlord may be though not necessarily adverse to the title of the mesne lessee (m), and the claim of the mesne lessee will be barred unless it can be inferred that such payment was made under an arrangement between him and the sub lessee (n) If the sub lessee purchases the reversion in fee but neither makes any payment of the rent due in respect of the underlease nor applies to the mesne lessee for the head rent the statute will not run against the title of the mesne lessee (o)

SECT 4  
When Time  
begins to  
Run

Claim must  
be wrongful  
and adverse

Meaning of  
wrongfully  
claiming

Sub le see  
purch. head  
rent

purchasing  
reversion

#### SECT 5 — Entry and Continual Claim

245 If land is in the possession of a trespasser the rightful owner is barred at the end of twelve years although he may from time to time during the twelve years have made entry on the land in assertion of his title unless such entry amounts to a resumption of possession by the owner (p)

Effect of  
entry

(g) The law was the same in this respect before the statute (*Cholmondeley v Clinton* (Lord) (1853) 10 M & W 107)

(h) *Sloane v Flood* (1855) 5 I C L R 75 see *Shaw v Keighron* (1869) 3 I R Eq 574 (receipt of rent by widow entitled to jointure)

(i) *Faybourn v Gridley* (1892) 61 L J (CH) 302 and as to apportionment of rent reserved see title LANDLORD AND TENANT Vol XVIII pp 452 et seq

(k) See Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 9 and see p 128 ante

(l) *Williams v Pott* (1871) L J 12 Eq 149

(m) *Drew v Norbury (Earl)* (1816) 3 Jo & Lat 267 *Doe d Newman v Goddall* (1840) 4 Q B 603 n

(n) See *Grogan v Regan* [1902] 2 I R 196 C A where the dictum of BLACKBURN L C, to the contrary in *Hayes v Woodley* (1852) 3 I C B R 142 which was followed by CHATTERTON V C in *Tuiss v Noblett* (1869) 4 I R Eq 64 80 was disapproved by the Irish Court of Appeal

(o) *Hayes v Woodley supra*

(p) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27), s 10 *Doe d*

## SECT 5

Entry and  
Continual  
Claim

**246** No continual or other claim upon or near any land will preclude any right of making an entry or distress, or of bringing an action (q)

## SECT 6—Possession by Co-owner or Relative of Owner

Continual  
claimPossession of  
one co-owner

**247** Where any one or more of several persons entitled to any land or rent as coparceners joint tenants or tenants in common have been in possession of the entirety or more than his or their undivided share or shares of such land or rent (i) for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of such land or rent such possession is not deemed to have been the possession of such last mentioned person or persons or any of them (s). So for the purposes of the Real Property Limitation Acts 1833 and 1871 (t) the possession of joint tenants tenants in common and coparceners is separate and is not the possession of the other joint tenants and without an actual ouster one co-owner can bring ejectment against the other and the other can defend his possession (u).

Possession of  
part of land  
by co-owner

If the person entitled to an undivided share in land is in exclusive possession of the whole land or of any part of it (v) whatever proportion such part may bear to the whole the title of his coparceners to their undivided share in such parts will be extinguished by such possession (a).

Receipt of  
rent

So also if one co-owner receives the entirety of the rents (b) of

*Julius v. Cent* (1891) 9 C B 114 *Intall v. Stens* (1803) 2 L & B 641  
*Intestment v. Fleet* (1851) 21 I J (Lx) 291 *Ill v. England* (1862)  
1 & L 41 *Ilon v. Laity* (1866) 35 I J (C P) 49 *Worsam v. Vanlen*  
*brantle* (1871) 1 W R 335 *Illy v. Iroughton* [1893] A C 556 P C As  
to title in general see title THE PASS.

(i) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 11 As to the  
nature of a continual claim and as to the law before the Act see 3 Bl Com  
110 Burton Compendium of the Law of Real Property 6th ed ss 402 403  
Limitation Act 1871 (21 Jc 1 c 16) stat (100) 4 & 5 Ann c 3 s 16

(r) The rent of inheritance see p 107 ante For the definition of land  
see p 106 ante

(s) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) 12 As to the  
law before the Act see Burton Compendium of the Law of Real Property  
6th ed ss 39, 98 Co Litt 171a Cole, Law and Practice in Ejectment  
Part I c 1 *Doe d. Fletcher and Taylor v. Prosser* (1714) 1 Cowp 217 *Doe*  
*d. Helling v. Prid* (1801) 11 List 49 *Culley v. Doe d. Taylorson* (1810) 11  
Ad & El 1005 *O'Sullivan v. Fee v. M. Swiney* (1841) 10 M. & T 111

(t) 3 & 4 Will 4 c 27 s 1 & 38 Vict c 57

(u) This provision was retrospective (*Culley v. Doe d. Taylorson supra* see  
*Doe d. Holt v. Horricks* (1834) 1 C B 566) As to ejectment see title  
EJECTMENT Vol I pp 34 46 and see title LANDLORD AND TENANT Vol XVIII  
p 333 note (s) As to the right of one tenant in common to sue his co-tenant  
for an account see *Henderson v. Lason* (1816) 10 Sim 303 *Henderson v. Eason*  
(1850) 17 Q B 701 Ex Ch

(v) *Ex parte Hasell* (1851) 3 Y & C (Ex) 611 *Illy v. Birch* (1893) 69  
L J 79 *Stewart v. Conyngham (Marquis)* (1851) 1 I Ch R 334 331 *he*  
*Dun v. Lute* (1871) 3 I R 1498 see *Paine v. Hyde* (1857) 24 Beav 151

(a) *Tibbitt v. James* (1871) 29 L J (Ex) 91 explained in *Murphy v. Murphy*  
(1864) 1 I C L R 201 *Monkton v. France* [1897] 2 Q B 143 C A,  
*Glyn v. Howell* [1909] 1 Ch 66,

(b) For the definition of rent see p 107 ante.

the property without accounting to his partner in title the statute will run in favour of the person so receiving the rents (c)

**248** After the statutory period during which one co owner has had exclusive possession or receipt of rents of the entirety has run out a subsequent payment of rent or acknowledgment of title by the co owner in possession to the other co owner cannot defeat the title which has been acquired (d)

**249** Where a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land or to the receipt of any rent enters into the possession or receipt thereof such possession or receipt is not deemed to be that of the person entitled as heir (e)

**SECT 6**  
Possession  
by Co owner  
or Relative  
of Owner

Acknowledg-  
ment after  
time has run

Possession by  
relation

## SECT 7—Acknowledgment of Title

### SUB SECT 1—In General

**250** When any acknowledgment of the title of the person entitled to any land or rent has been given to him or his agent (f) in writing signed by the person in possession or in receipt of the profits of such land or in receipt of such rent the right of the person to whom the acknowledgment was given or anyone claiming through him is deemed to have first accrued at and not before the time at which the acknowledgment or the last of such acknowledgments if more than one was given (g) but an acknowledgment is of no effect after the prescribed period has run out (h)

Acknowledg-  
ment in  
writing

(c) *Sanders v Sanders* (1851) 19 Ch D 5 (Ct A) *Jurroughs v M Creight* (1814) 1 Jo & It 290 *R Hobbs Hobbs v Hild* (1851) 6 Ch D 553 *Bolling v Hobday* (1862) 31 W R 9

(d) *Re Hobbs Hobbs v Wade supra* compare *Sanders v Sanders supra* (where payment in later years was held to raise a presumption of payment in earlier years)

(e) Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) s 13 As to the law before the Act see Gilbert's Tenure 2nd ed 24 Co Lit 21a *Pige v Selfby* (1680) Fuller Law of Nisi Prius 100 The effect of the entry of a father or mother upon the land of an infant child is governed by entirely different principles and is not within this provision see *Jones v Jones* (1841) 16 M & W 699 712 and p 160 *post*

(f) Admission to third parties is not sufficient see Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) s 14 But an acknowledgment contained in an answer in Chancery in a suit in which the person entitled was plaintiff was held to be a good acknowledgment (*Goode v Job* (1858) 28 L J (Q B) 1) As to acknowledgments in bankruptcy see *Hobson v Burns* (1849) 13 J I R 286 and pp 63 80 93 *ante* In an action by an executor for use and occupation a letter written by the defendant to the testator's attorney after the testator's death was admitted as an acknowledgment of the testator's title (*Linsdon v Clogg* (1842) 10 M & W 512 see *Johnston v Smith* [1896] 2 I P 82)

(g) Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) s 14 in which the word rent means rent as an inheritance see p 101 *ante* As to the effect of payment of rent as an inheritance see p 113 *ante* of interest on a mortgage see p 146 *post*

(h) *Sanders v Sanders supra* *Re M Clure and Garrett's Contract* [1899] 1 I R 225 Real Property Limitation Act 1833 (3 & 4 Will 4 c 2) s 34 The opinion that the effect of giving an acknowledgment under s 34 was immediately to set time running against the person to whom it

## SECT 7

**Acknowledgment of Title**

Essentials of acknowledgment

Effect of acknowledgment

**251** The acknowledgment must be signed by the person in possession and therefore signature by an agent is insufficient (i) but if a person signs the name of the principal by his direction and in his presence such signature is sufficient for in such case the person signing must be regarded not as the agent but as it were the hand or instrument of the principal himself (k)

Acknowledgment enures for the benefit of persons claiming under those to whom it is made (l) and an acknowledgment given by a person in possession is binding on those claiming through him (m)

## SECT 2 — What is Sufficient Acknowledgment

Acknowledgment in writing  
Proof

**252** An acknowledgment has no operation unless it is in writing but parol evidence of a lost written acknowledgment or to explain such an acknowledgment may be admissible (n) It is a question for the judge to decide whether a writing is such that it can be an admission of title and therefore evidence to go to the jury at all (o)

What is a sufficient acknowledgment

**253** Any acknowledgment in writing is sufficient if from it there may fairly be implied an admission that the person to whom it is given is the owner of the land in question Thus a correspondence from which it appears that the person in possession claims to hold the property till certain accounts as to charges thereon to which he claims to be entitled are settled will be sufficient (p) So if in answer to a claim for rent the person in possession does not deny the title of the person entitled but begs for forbearance this may be sufficient (q) An admission by the person in possession that he holds the property as tenant of the person entitled is sufficient (r) and so is an offer to take a lease although the offer was not accepted (s) A covenant to pay a mortgage debt in a deed executed subsequently to and referring to the mortgage is an acknowledgment of the existence of the relation of mortgagor and mortgagee, and

was given even although it had not begun to run before (see *Scott v Nixon* (183) 3 D & W 355 per SUGDEN LC at p 401 *Burroughs v M Creight* (1511) 1 Jo & Lat 290 04) is not warranted by the words of the statute

(i) *Icy v Lister* (155b) 3 H & N 101 compare *Jeus v Thomas* (1843) 3 Hue 26

(l) *Dublin Corporation v Lessee v Judge* (1547) 11 I I R 8 For forms of acknowledgment see *Encyclopedia of Laws and Precedents* Vol I pp 190 191

(k) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 14

(m) *Goode v Job* (1504) 25 J J (Q B) 1

(n) See cases cited in note (c) p 60 ante and see title EVIDENCE Vol XIII p 515

(o) See p 60 ante *Doe d Curzon v Edmonds* (1840) 6 M & W 290 Sugden on the Statutes relating to Real Property 2nd ed 67 compare *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland v Richards* (1841) 1 D & W 258 290

(p) *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland v Richards* supra

(q) *Lursdon v Clogg* (1842) 10 M & W 572

(r) *Goode v Job* supra

(s) *Dublin Corporation v Lessee v Judge* supra compare *Doe d Curzon v Edmonds* supra

therefore of the mortgagee's title (t) An acknowledgment made within twelve years of action admitting that the person claiming the property had a title more than twelve years before action is not sufficient, as it is quite consistent with the non existence of the title at the time when the acknowledgment was made (a) But an acknowledgment within the twelve years admitting that the person claiming had a title at a time within the twelve years, although not expressly admitting title at the time when the acknowledgment is made is it seems sufficient An admission that a person has recovered judgment in an action of ejectment is not an admission of title for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all (b)

SECT 7  
Acknow-  
ledgment of  
Title

SECT 8 — *Disabilities*

**254** If at the time at which the right of any person to make an entry or distress or to bring an action to recover any land or rent (c) has first accrued as defined in the Real Property Limitation Acts 1833 and 1874 (d) such person is either an infant or of unsound mind (e) then he or the persons claiming through him may, although the statutory period applicable in other cases has expired take such proceedings at any time within six years next after the time at which he ceases to be under any such disability or dies, whichever of these two events first happens (f)

Infants and  
lunatics

**255** Coverture is not a disability so far as regards the real estate of women married since the 31st December 1882 and so far as regards the real estate of women married on or before that date, whose title accrues after that date (g) But as regards the interests of a husband and wife in the wife's property when the marriage took place and the wife's title to the property accrued before the 1st January 1883, coverture is a disability within the above provisions (h)

Married  
women

(t) *Jayne v Hughes* (1811) 10 Lach 430

(a) *Hobson v Burns* (1813) 13 L L 286

(b) See *Hobson v Burn* *infra*

(c) For the definition of land and rent see pp 106 107 *ante*

(d) 3 & 4 Will 4 c 24 ss 3 1 ~ s 9 14 37 & 38 Vict c 54 ss 1 see pp 110—129 *ante*

(e) As to coverture see the text *infra* Absence beyond the seas ceased to be a disability on 1st January 1849 when the Real Property Limitation Act 1871 (37 & 38 Vict c 54) came into operation (*ibid* ss 4 12)

(f) Real Property Limitation Act 1874 (37 & 38 Vict c 54) s 3 see *Deane v Holliday* (1861) 11 Moo L C C 290 decided under the corresponding provision of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 24) s 16 The provisions of the Real Property Limitation Act 1871 (37 & 38 Vict c 54) as to disabilities have no application to an action for the redemption of a mortgage (*Kinsman v Rouse* (1881) 17 Ch D 104 10 and see title MORTGAGE)

(g) Married Women's Property Act 1882 (45 & 46 Vict c 54) ss 1 & 12 see *Lowe v Fox* (1855) 10 Q B D 667 C A p 206 *ante* and title HUSBAND AND WIFE Vol XVI pp 321 *et seq* 453 *et seq*

(h) Real Property Limitation Act 1874 (37 & 38 Vict c 54) s 3 see *Kennedy v Lyell* (1880) 10 Q B D 491, 498 *Hounsell v Dunning* [1902] 1 Ch 512



## SECT 8

## Disabilities

Successive  
disabilities  
in one person

**256** If before one disability ceases another supervenes time will not run against the person entitled to land until the last of such disabilities is removed (i) But no proceeding can be taken by any such person or by any person claiming under him except within thirty years after the accrual of the right of such person although he may have remained under one or more of such disabilities for the whole of such thirty years or although the term of six years from the time at which he ceased to be under any such disability or has died may not have expired (l)

in different  
persons

If a person is under any of the disabilities when his right accrues and dies without having ceased to be under such disability no time to file proceedings beyond the expiration of the statutory period after the accrual of the right to such person is allowed by reason of the disability of any other person (l)

Disability  
after time  
has begun  
to run

When time has once begun to run it will not be stopped by the occurring of a subsequent disability (m) Thus a remainderman, even if he is under disability when his remainder falls into possession (n) is barred at the same time as the tenant in tail would have been barred (o) had he lived

Quit rents

**257** The right to bring an action to recover quit rents is deemed to accrue not when default is made in payment but when the last payment is made (p) The effect of this is in some cases to make the provisions as to disabilities practically nugatory for a person may not be under disability when the last payment is made but may be under disability when the next day of payment arrives in such case time will be in to run against the person's right from the last payment and the supervening disability affords him no protection although no right of action accrued until he came under disability (q)

Coparceners

**258** If land descends to two coparceners one of whom is under disability but the other is not the disability of one does not preserve the title of the other after the expiration of the statutory period and if the one not under disability does not enter within that period, he or she is barred (r)

(i) *Pennock v. Williams* (1851) 1 H. & C. 155 S. 1 Hare Introduction to Conveyancing 2nd ed. 210 *See also* *State* (1851) 5 I. & Q. 498 and *ante*

(k) Real Property Limitation Act 1833 (37 & 38 Vict. c. 51) s. 3 see *Hounsell v. Dunlop* [1902] 1 Ch. 12 and p. 105 *ante*

(l) Real Property Limitation Act 1833 (37 & 38 Vict. c. 51) s. 15 as altered by the Real Property Limitation Act 1874 (37 & 38 Vict. c. 51) s. 9

(m) *Murray v. Wat' s* (1890) 62 L. J. 796

(n) *Murray v. Watlins* *supra* *Grier v. Hingrove* [1905] 2 Ch. 255 and see p. 105 *post*

(o) See p. 135 *post*

(p) Real Property Limitation Act 1833 (37 & 38 Vict. c. 51) s. 3 see p. 113 *ante* *Owen v. De Beauvoir* (1847) 16 M. & W. 541 *sub nom. De Beauvoir v. Owen* (1850) 5 Lach. 166 Lx. Ch.

(q) *Owen v. De Beauvoir* *supra* per PARKE B. at p. 567 *De Beauvoir v. Owen* *supra* per PATTERSON J. at p. 162 compare Sugden on the Statutes relating to Real Property 2nd ed. 11

(r) See *Re L. and L. v. L. v. L.* (1860) 2 Taunt. 441 decided under the Limitation Act 1623 (21 Jac. 1 c. 16) s. 2 (now repealed) As to estates in coparcenary see title REAL PROPERTY AND CHATELS REAL

**259** If the person to whom a signed acknowledgment of title is given is then under disability he has it seems the same extension of time for taking proceedings after the cessation of the disability as if his right had accrued when the acknowledgment was given (s)

SECT 8  
Disabilities.

Acknowledgment to persons under disability

POSSESSOR OF  
benefit of  
infant

**260** If a father or mother is in possession of land belonging to an infant child the parent will in ordinary circumstances be presumed to have entered on it as the guardian or bailiff of the infant and such possession during the infancy is one on which the statute will not operate (a) The entry on and possession of an infant's land by some person other than the father or mother may nullify the same rule applicable to such entry and possession (b) Where the person so held to be guardian or bailiff continues in possession after the infancy has ceased he is supposed to continue in possession in the same capacity as before unless something is done to change the character of the possession and the statute will not run even after the infancy has ceased until such character is changed (c)

#### SECT 9—*Estate in Tail*

**261** Where the prescribed period has run out against a tenant in tail during his life the right of all persons whom he might have barred by any act of his own is barred by the effluxion of time against him self (d) Where the prescribed period has begun to run against a tenant in tail in his lifetime but he has died before the completion of the prescribed period the effect is against all whom he might have barred by an act of his own is the same as if they whether issue in tail or remaindermen had claimed through him as he (e) These provisions affect both issue (f) and remaindermen

When rights of persons claiming under tenant in tail are barred

(a) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 3

(a) *Thomas v Almon* (1803) 2 K. & J. 19 *1 H. Bls Hobbs v Wade* (1867) 36 Ch D 355 *Mulhern v Dooc* (1853) 11 I. & L. 14 compare *W. Corrie v. (a) & (b) [1853]* 11 I. & L. 91 *the Meguire's and Mulhern's Contract* [1901] 1 I. R. 39 (c) A

(b) *Edly v. Lacombe* (1863) 4 C. R. 50 *Vinney v. Hillman* (1856) 22 Beav 452 *H. v. v. Shirlsley* (1851) 11 L. 171 q. 1859 *Lambert v. Lroune* (1850) 5 I. & L. C. I. 25 (c) *Edly v. Lacombe* (1855) 1 I. R. 1959 (A) to the guardianship of infant (c) title *INFANTS AND CHILDREN* Vol. XVII pp 111 e seq 131 e eq

(c) *1 H. Bls I. & L. v. H. & L. supra* *Hall v. Stanwell* (1851) 34 Ch D 16 *Inf. v. I. & L.* (1851) 11 I. & L. 91 *Mulhern v. Norman* supra

(d) Real Property Limitation Act 1853 (c & 4 Will 4 c 21) s 21 *Austen v. Ilexellum* (1853) 9 Exch 101 see *Lol on v. Kaye* (1852) 5 L. & Bing 21 *Died Smith v. I. & L.* (1852) 5 L. & Ad. 18 (decided under the Limitation Act 1623 (21 Jac 1 c 16) s 1 (now repealed)) *Murray v. Watins* (1890) 62 L. J. 796 In the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 21 the word barred is used in two senses at the beginning of the section it is used of the operation of the statute in barring a right of entry etc at the close of the section it is used of the barring of an estate tail by a conveyance As to the barring of an estate tail by a deed see title *LAND PROPERTY AND CHATELS* L. 111

(e) Real Property Limitation Act 1853 (3 & 4 Will 4 c 27) s 22 *Goodall v. Sterritt* (1855) 3 D. & W. 11

(f) By issue is meant all the issue of the first tenant in tail claiming per

## SECT 9

## Estates

## Tail

## Base fee

**262** A conveyance in fee by a tenant in tail otherwise than by deed duly enrolled (i) has the effect of giving to the grantee a base fee subject to be defeated by the entry of the issue in tail (h). In such case the right of the issue in tail accrues upon the death of the tenant in tail who executed the conveyance and time begins to run against them and all remaindermen from such death (i). So if possession is enjoyed under such deed for more than twelve years the right of the issue is not barred during the life of the grantor the case is the same as if the tenant in tail had merely granted away his life estate (k).

Assurance by  
tenant in tail  
in remainder

**263** Where a tenant in tail in remainder has executed an assurance which would have barred all remaindermen if he had at the time of its execution been tenant in tail in possession all the remaindermen are barred at the end of twelve years from the first time at which such tenant in tail or some person claiming under the entail would have been entitled in possession to the same estate tail (l). This provision only applies to assurances which though ineffectual to bar the remaindermen are effectual to bar the issue in tail (m). If a tenant for life having an estate tail in remainder after other life estates makes a conveyance in fee simple time does not begin to run until the estate tail falls into possession (n).

Possession  
under  
assurance

Possession also must be taken by virtue of the assurance and possession under the assurance will not begin to have any effect until the time arrives at which the tenant in tail who executed the assurance or some person claiming under the entail would have been entitled in possession to the same estate tail (o).

*formam doni* and capable of inheriting under the entail whether a sue of the tenant in tail against whom time has begun to run or not and as regards issue in tail see also the interpretation clause of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 1 where a person through whom another person is said to claim means *inter alios* issue in tail see also *Cannon v Rimington* (1852) 12 C B 116 *Murray v Wallins* (1830) 62 I L 146.

(g) Under the Fines and Recoveries Act 1833 (3 & 4 Will 4 c 74) see title REAL PROPERTY AND CHARTERS RELAT.

(h) See *Doe d Daniel v Woodroffe* (1819) 2 H L C 811 879 *Cannon v Rimington* *supra* at pp 12 14 *Morgan v Morgan* (1810) L R 10 Eq 99.

(i) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) ss 21 22 see *Cannon v Rimington* *supra* *Rimington v Cannon* (1852) 12 C B 18 34 Ex Ch *Murray v Wallins* *supra*.

(k) *Morgan v Morgan* *supra*.

(l) Real Property Limitation Act 1874 (37 & 38 Vict c 51) s 6 which has taken the place of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 23. Both provisions seem to have especial reference to assurances to be executed under the Fines and Recoveries Act 1833 (3 & 4 Will 4 c 74) which was passed in the same session as but after the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) see 1 Hayes Introduction to Conveyancing 5th ed 264 Sugden on the Statutes relating to Real Property 2nd ed 98 *Anderson v Anderson* (1861) 30 Beav 209 *Penny v Allen* (1857) 7 De G M & G 409 426.

(m) See *Penny v Allen* *supra* *Morgan v Morgan* *supra*.

(n) *Mills v Capel* (1875) L R 20 Eq 692.

(o) *Ibid*.

**264** If an estate tail is made inalienable by Act of Parliament, the Real Property Limitation Acts, 1833 (*p*) and 1874 (*q*), have no application (*r*)

SECT 9  
Estates  
Tail

**265** The provisions with respect to acknowledgments of title (*s*) and disabilities (*t*) apply to all cases which come under the Real Property Limitation Act 1833 (*p*) ss 21 22 But the Real Property Limitation Act 1874 (*a*) s 6 extinguishes the title of remaindermen at the end of twelve years from the moment when time has begun to run under that provision and makes no provision for acknowledgments or disabilities therefore no disability existing in the person of a remainderman and no acknowledgment made to him even if at the time of such disability or acknowledgment his right to recover the property has accrued prevents or delays the operation of that provision in extinguishing his title (*b*)

Inalienable  
estate tail  
Application of  
provisions as  
to acknow-  
ledgment and  
disabilities

#### SECT 10—*Equitable Rights to Real Property*

**266** Subject to exceptions in the case of trusts (*c*) concerned fraud (*d*) and acquiescence (*e*) every remedy in equity for the recovery of land or rent is in the same position as if it were a remedy at law not only as to the period of limitation, but also as to the time at which the right to sue is deemed to have accrued and as to all exceptions on the grounds of disability or otherwise (*f*) Thus a proceeding to recover title deeds (*g*) or an

Limitations  
for pro-  
ceedings  
in equity

(1) 3 & 4 Will 4 c 21

(g) 37 & 38 Vict c 51

(r) *Iberyenny (Tail) v Ilice* (182) L R 7 Lxch 145 see *Brighton Corporation v London Guardians* (1850) 5 C P D 565 A reversion to the Crown expectant on the determination of an estate tail granted by the Crown to a subject for services cannot be barred (Fines and Recoveries Act 1833 (3 & 4 Will 4 c 74) s 18 stat (1842 3) 31 & 32 Hen 8 c 20 s 2 *Robinson v Clifford* [1903] 1 Ch 865) To such a reversion the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 21) and 1874 (31 & 38 Vict c 51) would have no application

(s) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 14 see p 131 *ante*

(t) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 16 Real Property Limitation Act 1874 (31 & 38 Vict c 51) ss 3 & 4 see p 133 *ante*

(a) 37 & 38 Vict c 51 see p 136 *ante* This provision contains no reference to the other sections of the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 21) and 1874 (31 & 38 Vict c 51) such as is found in the Real Property Limitation Act 1874 (31 & 38 Vict c 51) ss 21 22

(b) As to the effect of a tenant in tail who is under no disability when he becomes entitled in possession afterwards coming under disability see *Murray v Watkins* (1890) 62 I L R 96 Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 22 and compare p 134 *ante*

(c) See p 139 *post*

(d) See p 143 *post*

(e) See p 144 *ante*

(f) See *Huls v Sallitt* (1851) 3 De G M & G 782 C A *Thompson v Simpson* (1841) 1 Dr & Wri 459 469 *St Mary Magdalen College Oxford v A G* (1851) 6 H L (as 189 210 The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 24 applies the limitations set out in *ibid* ss 1—23 to suits in equity The Real Property Limitation Act 1874 (31 & 38 Vict c 57), expressly applies to proceedings in equity and see title EQUITY Vol XIII p 170 As to an action of foreclosure of a mortgage of an advowson in gross see p 173 *post*, and to an action for an assignment of dower see p 107 *ante*.

(g) *Wells (Dean and Chapter) v Doddington* (1845) 2 Coll 73

- SECT 10** action on an equitable title for partition (h) or a foreclosure  
**Equitable** action (e) will be barred after twelve years  
**Rights to** If a tenant for life commits equitable waste, the waste is in  
**Real** effect an abridgement of part of the inheritance and an action by  
**Property** a remainderman in tail against the personal representatives of  
**Waste** the tenant for life is barred at the end of twelve years and  
time begins to run from the death of the tenant for life (k). If  
legal waste for instance felling timber by a person in possession for  
waste is committed the remainderman's remedy both at law and  
in equity is barred at the end of six years from the felling of the  
timber (l). But if the tenant for life is also entitled to the next  
estate of inheritance in remainder time runs only from his death  
and at the end of six years from such death every remainderman  
is barred of his remedy although his estate may not have fallen  
into possession within that period (m).
- Acquiescence** Even in cases of waste where time does not begin to run against  
the remainderman till the death of the tenant for life if the  
remainderman acquiesces before that event in the commission of  
the waste he may prejudice his remedy in equity (n). But to  
produce such result there must be something more than mere  
non interference by the remainderman (o).
- Charities** **267** Charities are within the general provisions as to limita-  
tion (p) subject to the exception in the case of express trusts (q).
- Whether** **268** If the claim of a trustee is barred by lapse of time the  
**beneficiary** right of any *cestui que trust* who is entitled in possession is also  
**is barred** barred (r). If the whole fee simple estate in land is vested  
**when trustee** in trustees upon trusts under which the persons interested take  
**is barred**

(h) *Imperial Trusts* [1904] 2 Q B 145 158 C A

(i) *Lough v Heath* (1882) 7 App Cas 235 *Harrell v Ishler* (1892) 19 Ch D 309 C A and see p 145 *but* the provisions as to disabilities (see p 133 *note*) are not applicable to a redemption action (*Arundell v House* (1881) 17 Ch D 104 105).

(k) Real Property Limitation Act 1874 (s 6 & 1 Will 1 c 21) s 24 *Leeds (Duke) v Amherst (Earl)* (1846) 2 Ph 111 see *Dalhousie v Napier* [1891] 5 Ch 306 386 C A As to equitable waste see title SETTLEMENTS As to waste by tenants for years see title LANDLORD AND TENANT Vol XXVIII pp 430 496 *et seq*.

(l) Limitation Act 1874 (21 Jac 1 c 16) s 3 see p 51 *ante* and see *Higgin botham v Haulins* (1872) 1 Ch App 66 *Dennis v Shillbrough* (1840) 4 Y & C (Ex) 42 *Seagiam v Knight* (1861) 2 Ch App 678 *Simpson v Smith* (1879) 5 L P Ir 306.

(m) *Birch Wolfe v Litch* (1840) L R 9 Eq 653 see *Bailey v Bagot Legge* v *Legge* (1813) 32 Beav 309 *Cent v Harris* (1859) John 317 *Funders v Norton* (1877) 6 Ch D 139 (see Rights and Liabilities as to Fines and Woods 132 146 161).

(n) *Harcourt v White* (1860) 28 Beav 303 *Louise v Cross* (1851) 14 Beav 105 *Lyons Association of Scotland v Siddal Cooper v Greene* (1861) 3 De G J & J 58 C A.

(o) *Life Association of Scotland v Siddal Cooper v Greene supra Leeds (Duke) v Amherst (Earl) supra*.

(p) See title CHARITIES Vol IV p 204.

(q) See p 142 *post*.

(r) *Llewellyn v Mackworth* (1740) 2 Eq Cas Abr 579 *Hvenden v Annealey (Lord)* (1806) 2 Sch. & Lef 607 629, see *Williams v Payorth* [1900] A O 563, P O.

in succession by way of remainder and a mere trespasser, not claiming through any conveyance and not having notice of the equities affecting the land gains possession, it seems that when the trustees are barred by disposssession for twelve years all the *cestui que trustent* out of possession are barred also their title being dependent on that of the trustees (c). In such a case in the absence of any special circumstance the *cestui que trustent* have no direct equity against the trespasser their only remedy against him being ejectment in the name of their trustees or ejectment in their own name in an action in which the trustees are made defendants as well as the trespasser. The *cestui que trustent* in such a case would also have a remedy against the trustee in an action for breach of trust but such an action would be barred at the expiration of six years from the time when the *cestui que trustent* became entitled in possession or ceased to be under disability (c).

**SECT 10**  
**Equitable**  
**Rights to**  
**Real**  
**Property**

Trespasser  
without  
notice of  
trust

If a trespasser who has notice of the equities to which the land is subject acquires as against a trustee a title to land by the operation of the statute he holds subject to the equities and the *cestui que trustent* in such a case have an independent remedy against the trespasser and time will not run against them until their estate becomes an estate in possession or they are free from disabilities (b).

Trespasser  
with notice of  
the equities

**269** Where the court during the pendency of an action is in possession of property by a receiver that possession enures for the benefit of the party to the action ultimately declared to be entitled so that during such possession time will run against but not in favour of a person who is a stranger to the suit (c).

Land in  
possession of  
receiver

**270** If a trustee who has received rents of property comes into court and asks for an account mere lapse of time does not deprive him of his right to have his rights and liabilities as an accounting party ascertained (d).

Right of a  
trustee to an  
account

**SECT 11—Express Trusts affecting Real Property**

**271** In the case of persons claiming under express trusts lapse of time is unimportant in all cases between the *cestui que trust* and the trustee or any person claiming through him otherwise than for value so long as the trustee or the person so claiming through him

Time does not  
run in favour  
of trustees or  
volunteers  
claiming  
under them.

(s) *Barroft v Murphy* [1896] 1 I R 290 *Cooper v Harrie* (1865) 18 Ir Jur 4 *Quinton v Litch* (1668) 2 I R Eq 396 416 *Lewin Law of Trusts* 11th ed 108, but see *Williams v Inpuorth* [1900] A C 563 P O

(a) *Trustee Act 1855* (s1 & s2 Vict c 59) s 8 see p 161 *post*

(b) *Scott v Scott* (1804) 4 H L Cas 1065 As to a purchaser who buys under a title less than forty years being affected with notice see titles **RIGHTY** Vol XIII pp 100 *et seq* **LANDLORD AND TENANT** Vol XVIII p 590 **SALE OF LAND**

(c) *Warron v Vye* (1812) 3 Dr & War 104 123 *Harrison v Dugnan* (1822) 2 Dr & War 295 *Hunt v Bateman* (1848) 10 I Eq R 360 378 *Groome v Lisle* (1808) 8 I C L R 128 Ex Ch *Re Butler's Estate* (1863) 13 I Ch R 453 *Re Slacks Estate* [1896] 1 I R 191 O A But as to an acknowledgment by the receiver see *Penney v Todd* (1878) 26 W R 502

(d) *Struth v O'Grady* (1870) L R 3 P O 311

**SECT 11**  
**Express**  
**Trusts**  
**affecting**  
**Real**  
**Property**

retains the property (e) The possession of the trustee is in effect deemed to be the possession of the *cestui que trust* (f) So long as a trustee receives the rents of an estate time does not run against the *cestui que trust* even though the trustee accounts for the rents to a person not entitled (g)

If property passes by the death of the trustee to his legal representative (h), or passes to a volunteer on conveyance (i) the right of the *cestui que trust* is preserved and time does not run against that right so that however long such a representative or volunteer holds the property with or without knowledge of the trust he will be liable at any time to an action to recover the inheritance and for an account of arrears of profits provided there be no acquiescence or laches on the part of the *cestui que trust* (l)

Purchaser for  
value from  
trustee  
without  
notice

Purchaser  
with notice

**272** If a trustee having the legal estate in fee simple conveys trust property to a purchaser for value without notice of the trust the *cestui que trust* has on general principles no right in equity against such purchaser and the right of the *cestui que trust* to the land is lost immediately on such conveyance (l) If however trust property has been conveyed to a purchaser for value with notice of the trust (m) the right of a *cestui que trust* if a right to an estate in possession to recover the property against such purchaser or anyone claiming under him as a volunteer or with notice will be barred in twelve years time from the conveyance (n) time running it seems not from the contract for the purchase by which the estate is transferred in equity but from the actual legal conveyance (o) The *cestui que trust* on the conveyance for value being made, is in the position of any equitable owner who has a remedy in equity but has no express trust in his favour the time from which the statute begins to run depends on the nature of the equitable limitations and so will not run

(e) Peal Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 25 *Law v Pagwell Evans v Pagwell* (1813) 4 Dr & Wal 398 408 As to claims against a trustee for breach of trust when he has parted with the property see p 161 *pos* As to what are express trusts see titles EQUITY Vol XIII p 151 TRUSTS AND TRUSTEES

(f) *Hunt v Bateman* (1848) 10 I Eq R 360 *per DENNIFATHER B* at p 350

(g) *Lister v Pelford* (1865) 34 L J (CH) 582 see *Knight v Lowyer* (1806) 2 De G & J 421 C A *Christ Hospital v Grainger* (1848) 1 Mac & G 460 *East Stonehouse Urban Council v Willoughby Brothers Ltd* [1902] 2 K B 318 As to the effect of possession by the *cestui que trust* see p 138 *ante*

(h) *Salter v Cavanagh* (1838) 1 Dr & Wal 668 *Smith v Smith* (1876) 1 L R Ir 206 C A *Luttrell v Simpson* (1889) 24 Q J D 128

(i) See *Sturges v Morse* (1804) 3 De G & J 1 C A

(k) As to acquiescence and laches see title EQUITY Vol XIII pp 166 *et seq* 168 *et seq*

(l) See titles SALE OF LAND TRUSTS AND TRUSTEES and p 138 *ante*

(m) As to purchasers for value being affected by notice see titles EQUITY Vol XIII pp 76 86 SALE OF LAND

(n) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 25

(o) *A-G v Hunt* (1814) 4 Har 147 As to a settlement by a trustee of the trust property in a marriage settlement see *Ietie v Ietie* (1803) 1 Drew 371 391 As to the manner of purchaser in the Real Property Limitation Act, 1833 (3 & 4 Will 4 c 27) s 25 see *Smith v Smith* (1876) 1 L R Ir 206 C A, *A-G v Davis* (1810) 18 W R 1132

as against parties entitled in remainder or under disability until the remainder becomes an estate in possession or in case of disability until the parties under disability cease to be so or the period of thirty years has expired from the accrual of the right (p)

SECT 11  
Express  
Trusts  
affecting  
Real  
Property

**273** If an annuity is charged on land on an express trust and the land remains in the hands of the trustee the annuity is 'a rent' within the interpretation clause of the Real Property Limitation Act 1833 (q) and is not a sum of money or legacy charged upon or payable out of land within the meaning of the Real Property Limitation Act 1874 (r) s 10. If no payment in respect of such annuity is made for more than twelve years the annuity is not extinguished (s) but the Real Property Limitation Act, 1874 (t) s 10 applies to the annuity and no distress or action can it seems be brought to recover any annuity or at least not more than six years annuity (t)

Annuity  
charged on  
land secured  
by trust

A devise to a person beneficially subject to an annuity or other series of periodical payments does not create an express trust so as to except the case from the operation of the statute (a) nor does a conveyance of land to a person beneficially subject to such a charge when the grantee covenants with the grantor to pay the annuity (b). But such a trust is created when land is devised to trustees subject to a charge of annuities in trust to convey in strict settlement (c)

Devise or  
conveyance  
subject to  
annuity

**274** Lapse of time as between a trustee and a *cuius que trust* is only unimportant in cases of express trusts of land or rent (d) that is cases where such land or rent is vested in trustees on trust either declared in express terms by a deed will or other written instrument or else stated in such language that by the rules of construction put on that language by courts of equity the legal estate

Express  
trusts

(p) *Thompson v Simpson* (1841) 1 Dr & War 409 489 *St Mary Magdalen College Oxford v A C* (1801) 6 H L 115 189 215 see *Towin Law of Trusts* 11th ed 1100 and as to the period of thirty years see p 134 ante

(q) 3 & 4 Will 4 c 21 see p 107 ante

(r) 37 & 38 Vict c 51 see p 82 ante

(s) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 20 see the text *supra*

(t) See p 97 ante and see *Hughes v Coles* (1884) 21 Ch D 231 *Dower v Dower* (1885) 15 L R 11 264 *Re Nisbet's Trusts* (1880) 19 L R Ir 140 *Re Belton's Estate* [1894] 11 I J 37 compare *Re Drakes' Estate* [1909] 1 I R 136 C A. As to the Real Property Limitation Act 1874 (31 & 32 Vict c 51) s 10 which deals with money charged on land see p 82 ante

(a) See *Francis v Grover* (1840) 5 Hare 39 *Hunt v Liteman* (1848) 10 I Eq R 360 *Jacquet v Jacquet* (1809) 27 Leav 312 *Dickenson v Linsdale* (1862) 1 De G J & Sm 52

(b) *Harrison v Dugman* (1842) 2 Dr & War 290 *Hughes v Kelly* (1843) 3 Dr & War 482 *Massy v O'Dell* (1809) 10 I Ch R 22 *Thomson v Laetwood* (1877) 2 App Cas 210 *Cunningham v Foot* (1878) 5 App Cas 974

(c) *Charitable Donations Commissioners v Hydrants* (1840) 7 I Eq R 580 *Hughes v Coles supra* *Le Agent's Trusts supra*. But as to the effect of the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 10, see p 82 ante

(d) For the definition of 'rent' see p 107 ante.



**SECT 11**  
**Express**  
**Trusts**  
**affecting**  
**Real**  
**Property**

is vested in the trustees and the beneficial estate in another (e) The existence of a constructive trust does not prevent time from running thus a person who has been in possession of land as a constructive trustee for more than twelve years may set up the statute against the person who but for the lapse of time would be the rightful owner (f)

**Charities**

**275** Although a mere gift direct to a charity creates no express trust (g) land or rent may be granted or devised in such a way as to create an express trust in favour of a charity. In such a case, so long as the property is in the power of those on whom the duty is cast of dealing with it for the purposes of the charity, the rights of the parties entitled to the benefit of the charity are preserved from the effect of lapse of time (h)

**Trespasser in**  
**possession of**  
**charity land**

If a trespasser or a person who claims independently of the right of the charity gets into possession time will run against the title of the charity just as it would against any *cestui que trust* entitled under an express trust if the trustees were out of possession and the property held by a stranger (i)

**Lease by**  
**charity**  
**trustees**

**276** If the trustees of the charity demise it by a lease reserving rent and the rent has been regularly paid the right of the persons entitled to the benefit of the charity to upset the lease is barred at the end of twelve years from the time when it was granted (k). If a charity makes a lease of land which is void

(e) *Hunt v Latham* (1848) 10 I Lq I 360 *Drummond v Sant* (1871) L P 6 Q B 763 *Dunlin v Lenthyn* (Lord) (1818) 4 App Cas 51 *Cunningham v Iock* (1858) 5 App Cas 91 *The Augustus Trusts* (1880) 19 I R Ir 140 *Irish v Phillips* (1894) 13 P 191 *Lochehoucauld v Fowstead* [1894] 1 Ch 196 C A *The Mentalis (Laird) Estate* [1909] 1 I R 390 *Re Drake's Estate* [1909] 1 I R 101 C A *Life Estate of Scotland v Siddal* (Cooper v Greene) (1861), 3 De G I & J 56 C A *Soar v Ashwell* [1893] 2 Q B 390 C A *Smith v Smith* (1876) 1 L R Ir 206 C A *Salter v Caranagh* (1838) 1 Dr & Wal 668 *Laird v Simpson* (1869) 21 Q B D 128 *Vugent v Nugent* (1884) 10 I R Ir 321 *Mathew v Irise* (1801) 14 Peav 341 As to constructive trusts see title **TRUSTS** Vol XIII pp 104 *et seq* **TRUSTS AND TRUSTEES** As to the admission of extrinsic evidence in construing them see title **EVIDENCE** Vol XIII p 567

(f) *Petre v Petre* (1653) 1 Drcw 371 393 see *Henderson v Atkins* (1809) 28 I J (Ch) 910 *Sants to Thompson* (1883) 22 Ch D 614 *Re Dane's Estate* (1811) 5 I R Fq 498 *Churches v Martin* (1889) 42 Ch D 312 *Re Lucy Lyndal Central Theatrical and Association v Kydd* [1899] 2 Ch 149 *Lawley v Hoband* (1810), 1 L 20 Fq 428 *Maon v Broadbent* (1863) 33 Beav 296 *Telling v Larler* (1812) 5 Ch App 30 *Re Abison Johnson v Munsey* (1879) 11 Ch D 254 C A *Chapman v Corpe* (1819) 41 L T 22

(g) *Charitable Donations Commissioners v Wybrants* (1840) 7 I Lq R 380 *St Mary Magdalen College Orford v A G* (1857) 6 H L Cas 189 compare *Re Drake's Estate* [1909] 1 I R 136 C A See generally title **CHARITIES** Vol IV pp 204 *et seq*

(h) *Charitable Donations Commissioners v Wybrants supra A G v Perse* (1812) 2 Dr & War 67 1 G v Davis (1810) 15 W R 1132

(i) *Magdalen Hospital (Trustees and Governors) v Knotts* (1879) 4 App Cas 324 and see title **CHARITIES** Vol IV p 201 As to the running of time in favour of a charity in respect of land acquired under a void conveyance or lease see title pp 204 205

(k) *A G v Duvey* (1859) 4 De G & J 136 C A *A G v Payne* (1869) 27 Beav 168 and see title **CHARITIES** Vol IV p 228 As to right of the

*ab initio* and the lessee enters and pays no rent, the title of the charity is barred at the expiration of twelve years from the entry (l)

### SFCT 12—*Fraud*

SLOT 11  
Express  
Trusts  
affecting  
Real  
Property

Concealed  
fraud

**277** In every case of a concealed fraud the right of any person to sue to recover any land or rent of which he or the person through whom he claims may have been deprived by such fraud is deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been discovered except as against any *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud and who at the time he made the purchase did not know, and had no reason to believe that any such fraud had been committed (m)

This provision applies to a case of designed fraud by which a person knowing to whom the right belongs conceals the circumstances giving the right, and by means of such concealment enables himself or some other person to enter and hold (n) For instance where an insolvent deliberately omits to give information as to his property (o) or a person is designedly brought up as the second legitimate son whereas he is in fact the eldest (p)

Application of  
provision

**278** A conveyance by a lunatic may be void or voidable but the mere fact of possession having been obtained from a lunatic or person of infirm mind is not of itself sufficient to establish a case of fraud (q) But such a fact is an element in the proof of fraud and if the execution of a conveyance or devise be obtained from such a person in circumstances which show *mala fides* on the part of the grantee or devisee this is a case of fraud (a) A lunatic may be within the exception of the statute provided especially for

Conveyance  
by a lunatic

beneficiaries as against a purchaser for value under a conveyance see title CHARITIES Vol IV p 204

(l) *Magdalen Hospital (Resident and Governors) v Knolls* (1519) 4 App Cas 324 As to the liability of trustees holding on express trusts for a charity to account when there has been a fraudulent misappropriation by the trustees see title CHARITIES Vol IV pp 276 *et seq*

(m) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 26 which specifically referred only to suits in equity but by the effect of the Judicature Act 1873 (36 & 37 Vict c 66) s 24 (3) it will it seems affect proceedings in all branches of the Supreme Court where equitable relief is sought As to equitable relief against fraud see title EQUITY Vol XIII pp 13 *et seq* as to fraud generally see title MISREPRESENTATION AND FRAUD

(n) *Petre v Petre* (1803) 1 Drew 371 397 *Halls v Howe (Earl)* [1893] 2 Ch 545 551 552 O A *Rams v Buxton* (1880) 14 Ch D 331 (where mere occupation of a cellar was held not within the provision) but see *Re McCallum McCallum v McCallum* [1901] 1 Ch 143 O A and compare p 49, *ante*

(o) *Sturgis v Morse* (1806) 3 De G & J 1 C A

(p) *Vane v Vane* (1873) 8 Ch App 383

(q) *Price v Berrington* (1850) 3 Mac & G 486 *Manby v Benwick* (1857) 3 K & J 342 compare title EQUITY Vol XIII p 16 and see generally title LUNATICS AND PERSONS OF UNSOUND MIND pp 389 *et seq post* See also as to conveyances impeachable by the position of the parties, title FRAUDULENT AND VOIDABLE CONVEYANCES Vol XV p 103

(a) *Lewis v Thomas* (1843), 3 Hare 28.

## SECT 12

**Fraud.**

disabilities (b) but in deciding at what time a person who has been defrauded might with reasonable diligence have discovered the fraud the court will not regard the capacity of such a person's mind to discover the fraud (c)

Diligence in  
discovery of  
fraud

**279** To prove that a person might have discovered a fraud within a reasonable time it is not it seems sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter it must be shown that there has been something to put him upon inquiry respecting the matter itself, which inquiry if made would have led to the discovery of the real facts (d) But the fact that a very considerable interval of time has elapsed between the alleged fraud and its discovery may of itself be a reason for inferring that the fraud might with reasonable diligence have been discovered long before (e)

Party sued  
must be privy  
to fraud

**280** The fact that a concealed fraud has been committed does not prevent the running of time if neither the person sued nor his predecessor in title nor the agent of either was party or privy to the fraud at the time of its performance (f)

*Bona fide*  
purchaser for  
value

**281** Fraud does not prevent the running of time in the case of a *bona fide* purchaser who had no reason to believe that a fraud had been committed It seems that the same circumstances as would be held sufficient to enable the person defrauded to discover the fraud with reasonable diligence should be considered sufficient to give a purchaser reason to believe that a fraud had been committed (g)

Purchase  
through agent

A purchaser for value who though himself ignorant of the fraud contracts through an agent who knows of the fraud is not protected (h)

SECT 13 — *Acquiescence*

Acquiescence

**282** A court of equity may refuse relief before the lapse of the statutory period in all cases in which on account of the plaintiff's acquiescence or on any other ground courts of equity would before the Act have refused relief (i)

(b) Real Property Limitation Act 1833 (37 & 38 Vict c 37) s 3 see p 133 *ante*

(c) *Manby v Cullie* (1801) 3 K & J 342

(d) *Stungis v Morse* (1808) 3 De G & J 1 C A

(e) *Chetham v Hare* (1810) L R 9 Eq 371 see *Laurance v Norreys* (1890) 15 App Cas 210 *Re Kennen's Will* *v Howe* (Part) (1880) 50 I J (Ch) 1 *Hills v Howe* (Earl) [1895] 2 Ch 540 C A In *Chetham v Hare* *supra* MALINS V C expressed an opinion that the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 26 should receive the strictest interpretation

(f) *Re McCallum* *McCallum v McCallum* [1901] 1 Ch 143

(g) *Stungis v Morse* *supra*

(h) *Vane v Line* (1813) 8 Ch App 383

(i) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 27 which gives no new effect to acquiescence but leaves the rules of equity on this subject as they were before and makes it clear that the statutory limitations applicable to suits in equity were not intended to interfere with such rules As to the rules of equity with regard to acquiescence see title EQUITY Vol XIII p 166

SECT 14 — *Mortgagor and Mortgagee*SECT 14  
Mortgagor  
and  
MortgageeSUB SECT 1 — *Right of Mortgagee to Recover Mortgaged Land*(1) *When the Mortgagor is in Possession*

**283** The right of a mortgagee (j) to enter upon the mortgaged land and to bring an action for its recovery if no principal or interest is paid in respect of the mortgage is barred twelve years after the right has accrued to him or someone through whom he claims (k)

Mortgagee's  
right

**284** The date from which time runs against the mortgagee when there has been no acknowledgment and no payment of principal or interest, depends partly on the nature of the property mortgaged, partly on the nature of the remedy which the mortgagee seeks to enforce and partly on the form of the mortgage deed. If in the case of an interest in land in possession, the mortgagee seeks to enter or recover possession of the land by action of ejectment time in the case of a mortgage in the ordinary form will run from the date of the mortgage from which time the mortgagee has the right of possession (l) and this is so even when the mortgage contains a covenant that it shall be lawful for the mortgagee to enter after default has been made in payment (m). If, however, there is a provision in the mortgage for quiet possession by the mortgagor until default upon a certain day and the mortgage deed is executed by the mortgagee the deed operates as a demise by the mortgagee until the day named till then accordingly ejectment will not lie nor will time run against such an action (n). If on the other hand the remedy adopted is foreclosure time will run from the date fixed for the payment of the principal (o), and when the principal is made payable on demand

Date from  
which time  
runs

(j) As to the rights of mortgagor and mortgagee generally see title MORTGAGE

(k) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1 Real Property Limitation Act 1873 (3 & 4 Will 4 c 27) s 3. The time when the right accrues is governed generally by the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1 and the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 3rd branch. As to the effect of payment of principal or interest see p 146 *post*. The personal remedies of the mortgagee to recover the mortgage debt are generally governed by the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3 and the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 42 see pp 76 82 97 *ante*.

(l) *Doe d Roylance v Lightfoot* (1841) 8 M & W 553 see *Rivers v Grazebrook* (1846) 8 Q B 895 *Green v Burns* (1879) 6 L R 11 1/3. In this event the action which is one to recover possession of the land falls within the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 3rd branch, see p. 110 *ante*.

(m) *Doe d Roylance v Lightfoot supra*

(n) *Willinson v Hall* (1837) 3 Bing (N o) 508

(o) *Kibble v Farthorne* [1890] 1 Ch 219 220. Here the action which is one to recover the equity of redemption in the land (*Warron v Vize* (1842) 3 Dr & War 104 120) falls within the Real Property Limitation Act, 1833 (3 & 4 Will 4 c 27) s 3 3rd branch see p 115 *ante* (*Willison v Vize, supra* at p 117) see *Johnson (Samuel) & Sons Ltd v Brock* [1907] 2 Ch 533 536. As to the effect of a foreclosure order, see p 147, *post*.

**NOTE 14**  
**Mortgagor and Mortgagee**

Effect of payment of principal or interest

By whom interest must be paid

To whom interest must be paid  
 Payment after twelve years non payment

time will run from the date of the mortgage deed (p) If the interest mortgaged is reversionary time will not run against a foreclosure action till the interest falls into possession although the personal remedy to recover the mortgage debt may then be barred (q)

**285** If any payment has been made in respect of the principal or interest due on a mortgage time runs against any person claiming under the mortgage from the last of such payments (r), whether in the case of foreclosure or ejectment (s)

The payment of principal or interest must be by a person liable as mortgagor or by some person on his behalf (t) Part payment or payment of interest by the owner of part of the property will preserve the mortgage as to the whole against all the property originally mortgaged (a)

Payment by a tenant for life is good as against remaindermen (b) If the mortgagee or the person entitled to the interest on the mortgage debt is a tenant for life of the mortgaged land time will not run during his life (c)

Payments by a mortgagor (d) or by a person bound as between himself and the mortgagor to pay (e) prevent time running in favour of an assignee of the equity of redemption (f)

**286** The payment of principal or interest must be made to a person entitled to receive it as mortgagee (g)

**287** If there was no possession adverse to the mortgagor at the date of the mortgage and interest is paid within twelve years of

(p) *Le Lincuns (J) v Lute Burton v Piron* [1893] 2 Ch 300 305 compare *Le Turner Turner v Sykes* (1894) 43 W L 135 (where the covenant was to pay on the death of a tenant for life) *Hamill v Mathews* (1909) 44 I L T 20 C A (where there was a covenant that the principal should not be called in for twenty years)

(q) *Hamill v Williams* n (1888) 35 Ch D 480 *Re Falcus Trusts* (1890) 63 I L T 116 *Re Conlan's Estate* (1892) 29 L R Ir 199

(r) Real Property Limitation Act 1881 (s 4 & 1 Vict c 28) (sometimes called Little's Act) Local Property Limitation Act 1844 (s 7 & 38 Vict c 31) s 1 see *Doe v Jones v Williams* (1851) 5 Ad & Ll 231

(s) *Harford v Ashberry* (1852) 19 Ch D 333 C A

(t) *Newbould v Smith* (1886) 33 Ch D 127 C A *Illis v Illis* [1905] 1 Ch 610 619 *Ilson v Minard* (1906) 51 Sol Jo 132 As to the effect of payment of rent by a tenant of the mortgaged property see p 72 ante or by a receiver see pp 12 94 ante As to payment of interest by a person other than the mortgagor entitled to pay see p 94 ante or by a person liable only to the mortgagor to pay see p 94 ante Such cases are applicable to the provisions now being dealt with

(a) *Chinner v Evans* (1864) 11 H L Cas 115 133 *Le Muskerrey* (1858) 9 I Ch R 94 C A and see p 96 ante As to the effect of payment of interest by the specific devise of mortgaged property on the right of the mortgagee to an order for the administration of the whole of the testator's real estate see *Re Lacey Howard v Lightfoot* [1907] 1 Ch 330 C A

(b) *Barclay v Owen* (1889) 60 I L T 220 see *Gregson v Hindley* (1846) 10 Jur 363 (where an admission by deed by a tenant for life of payment of interest was held not sufficient)

(c) *Wynne v Styant* (1641) 2 Lh 303 *Corbett v Barler* (1796) 3 Anst 755 *Topham v Booth* (1881) 35 Ch D 607 *Re Innegan's Estate* [1906] 1 I R 370 *Re Haues Re Burchell* *Richell v Haues* (1892), 62 L J (Ch) 463

(d) *Chinnery v Evans* *supra*

(e) *Bradshaw v Widdrington* [1902] 2 Ch 430 C A *Cann v Taylor* (1859) 1 F & F 651

(f) See *contra Newbould v Smith* (1886) 33 Ch D 127 C A

(g) *Barclay v Owen* *supra* and see p 94 ante

action brought, the mortgagee can recover the mortgaged land even although twelve years may previously have elapsed within which no interest was paid (*h*)

SECT 14.  
Mortgagor  
and  
Mortgagee

**288** Where the property is vested in trustees who receive and accumulate the rents but nothing is paid by the mortgagor to the mortgagee the latter will be barred after twelve years (*i*)

Property  
vested in  
trustees

**289** Receipt of interest on a debt secured by a mortgage of a rentcharge will not it seems have the effect of keeping alive the mortgagee's right to distrain for the rentcharge on the land out of which it issues (*k*)

Payment in  
case of  
rentcharge

**290** A mortgagor in possession is not deemed a tenant at will to his mortgagee (*l*) unless he has paid the mortgage debt and is in possession of the property without a reconveyance having been made to him in which case the mortgagee's title to the legal estate is extinguished in thirteen years from the payment (*m*)

Mortgagor  
in possession  
after debt  
paid

**291** An order of foreclosure absolute obtained by a legal mortgagee vests the ownership and the beneficial title to the land in him for the first time and a fresh right accrues to him at the date of the order and an action to recover the land within twelve years of the order is not barred although more than twelve years may have elapsed since the legal estate was conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage (*n*)

Effect of fore-  
closure order

(*h*) Real Property Limitation Act 1877 (7 Will 4 & 1 Vict c 25) The Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 34 has it seems no application as against a mortgagee where interest has been paid see the words at the end of the Real Property Limitation Act 1833 (7 Will 4 & 1 Vict c 26)—anyhow, in the said Act (i.e. the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) notwithstanding. In *Hemming v Blinton* (1813) 42 L J (C P) 168 there had been possession adverse to the mortgagor at the date of the mortgage and the mortgagee's right would have been extinguished even if interest had been regularly paid compare (*regson v Hindley* (1816) 10 Jur 383

(*i*) *Re Ha eldine's Trusts* [1908] 1 Ch 34 C A

(*k*) The Real Property Limitation Act 1837 (7 Will 4 & 1 Vict c 28) is confined to mortgages of land as defined by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 1 that is to mortgages of corporeal hereditaments and of tithes in the hands of any person except spiritual and eleemosynary corporations sole (see *Brooks v Muelletton* [1809] 2 Ch 519 522 and p 106 *ante*) the Real Property Limitation Act 1837 (7 Will 4 & 1 Vict c 28) does not apply to mortgages of rentcharges. It seems that if a mortgagee of a rentcharge does not receive any instalment of the rentcharge or any acknowledgment under the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 14 from the person in possession of the land out of which the rentcharge issues and does not take any proceedings against such person to recover the rentcharge the mortgagee's right as against the land will be barred at the expiration of twelve years from the mortgage debt becoming due (Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 3 3rd branch see p 110 *ante*) although he may have received interest due on the mortgage. As to rentcharges generally see title RENTCHARGES AND ANNUITIES

(*l*) Within the meaning of the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 7 see p 120 *ante*

(*m*) *Sands to Thompson* (1883) 22 Ch D 614

(*n*) *Pugh v Heath* (1882) 7 App Cas 235 and as to foreclosure generally see title MORTGAGE

## SECT 14

## (u) Where a Third Party is in Possession

**Mortgagor and Mortgagee**

Mortgagor out of possession at time of mortgage

**292** If the mortgagor is himself out of possession at the date of the mortgage whether the property is in the occupation of a tenant or of someone holding without a title the period of limitation in favour of the person in possession and as against the mortgagee in cases where no payment of principal or interest has been made must be calculated from the time at which if no mortgage had been executed the statute would begin to run against the title of the mortgagor or those through whom he claims (o)

Effect of payment of interest

When possession is not adverse

But when some payment has been made in respect of the mortgage debt or interest the payment sets time running afresh in favour of the right of all persons claiming under the mortgage as against all persons in possession provided that such possession was not adverse to the mortgagor at the time of the mortgage (p) or that the persons in possession had not at the time of the mortgage gained a good title under the statute as against the mortgagor (a) So if at the date of the mortgage a person is in possession by permission of the mortgagor and not adversely to him then although the statute may have begun to run against the mortgagor if he pays interest or a part of the mortgage debt to the mortgagee such payment confers a new right of entry on the mortgagee and so long as such a payment is made time will not run against his right although time will continue to run against the right of the mortgagor (b) In such case at the expiration of the statutory period the mortgagor's equity of redemption will be barred but it seems the person so in possession will have a right to redeem the mortgage (c)

When possession is adverse

If however at the date of the mortgage a person is in possession adversely to the mortgagor the payment of interest or of part of the mortgage debt will not preserve the mortgagee's right as against the person so in possession (d)

Persons claiming under a mortgage

**293** A mortgagor who pays off a mortgage is not a person claiming under a mortgage within the meaning of the Real Property Limitation Act 1837 (e) and time will not commence to run again from the date of such payment as against a third party

(o) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) ss 3 *et seq*

(p) *Doe d Palmer v Lyne* (1851) 17 Q B 366 *Lord v Ager* (1863) 2 H & C 279 *Doe d Baddeley v Massey* (1851) 17 Q B 373 *Lyne v Walsh* (1860), 10 I O L R 346 *Ludbrook v Ludbrook* [1901] 2 K B 96 C A *Thornton v France* [1897] 2 Q B 143 C A

(a) *Doe d Palmer v Lyne supra per Lord CAMPBELL CJ*, at p 312 *Hemming v Blanton* (1873) 12 L J (C P) 108

(b) See *Doe d Palmer v Lyne supra* and cases cited in note (p) *supra* The effect of the Real Property Limitation Act 1837 (7 Will 4 & 1 Vict c 28) in such a case is as regards the mortgagee's right to restore the old doctrine of adverse possession as it existed before the Real Property Limitation Act 1833 (3 & 4 Will 4, c 27) As to the abolition of the doctrine otherwise see p 10, *ante*

(c) *Fletcher v Bud* (1896) Fisher Law of Mortgage 5th ed, Appendix, 972

(d) *Thornton v France* [1897] 2 Q B 143 C A

(e) 7 Will 4 & 1 Vict. c. 28 see p 146 *ante*

in possession (f) A person who pays off a mortgage debt and takes at once a conveyance of the legal estate in the mortgaged land from the mortgagee and of the equity of redemption from the mortgagor is a person claiming under a mortgage to the extent of the interest which he purchases from the mortgagee but not with regard to the interest which he affects to purchase from the mortgagor (g) If a person buys from a mortgagee who exercises a power of sale where his title is unbarred the purchaser takes the whole interest legal and equitable in the mortgaged land and the effect of such sale it seems is that a person who has by possession acquired a title under the statute to the equity of redemption loses his title

SECT 14  
Mortgagor  
and  
Mortgagee

294 The fact that a first mortgagee has taken possession after time has begun to run against a second mortgagee does not suspend the running of time against the latter (h)

Time as  
against second  
mortgagee

#### SUB SECT 2—Redemption Actions

##### (1)—When the Mortgagor is Barred

295 If a mortgagee has obtained possession or receipt of the profits of any land or receipt of any rent (i) comprised in the mortgage the mortgagor or any person claiming through him can only bring an action to redeem the mortgage within twelve years next after the time at which the mortgagee obtained such possession or receipt unless in the meantime an acknowledgment of the title of the mortgagor has been given (j)

Possession of  
mortgage  
bars  
mortgagor

296 When the mortgagee goes into possession (l) the statute runs against the mortgagor and all persons claiming through him therefore if an equity of redemption is settled and after the settlement takes effect the mortgagee goes into possession all persons claiming under the settlement will be barred of their right to redeem in twelve years from the mortgagee's going into possession and it is immaterial at what times their several estates take effect in possession (m)

Settlement of  
equity of  
redemption

297 If the mortgage contract provides in terms that the mortgagor may redeem at any time during a period extending beyond

Extension of  
time for  
redemption

(f) *Lhornton v France* [1891] 2 Q B 143 C A *Lough v Heath* (1882) 7 App Cas 235 A mortgagor who redeems would it seems be in the same position

(g) *Doe d Baddeley v Massey* (1851) 11 Q B 313 see *Lord v Iger* (1863) 2 H & C 219

(h) *Johnson (Samuel) & Sons Ltd v Brocl* [1907] 2 Ch 333 compare *Abble v Lurthorne* [1895] 1 Ch 219 *Re Birmingham's Estate* (1870) 51 R Eq 117 C A

(i) Rent means rent as an inheritance see p 107 ante

(k) Real Property Limitation Act 1844 (37 & 38 Vict c 57) s 7 As to acknowledgments see p 151 post As to a Welsh mortgage see *Balfe v Lord* (1842) 2 Dr & War 480 and title MORTGAGE

(l) The words possession or receipt of profits (see the text *supra*) seem to include the case of a mortgagee receiving rent from a tenant in possession receipt of such rent by a mortgagee for twelve years will it seems bar the mortgagor's right to redeem (*Hart v Carttar* (1865) L R 11 q 29 *Markwick v Hardsingham* (1880) 15 Ch D 339 C A)

(m) *Browne v Cork (Bishop)* (1839) 1 Dr & Wal 700



## SECT 14

**Mortgagor  
and  
Mortgagee**Mortgagee  
purchasing  
life estate

twelve years, the mortgagor's title it seems, will not be barred in twelve years after the mortgage's possession commenced (*n*)

**298** If the tenant for life of an estate pays off a charge on the estate he is in the absence of evidence of an intention to put an end to the charge entitled to it for his own benefit and although twelve years elapse before his death without anything being paid on account of the charge or any acknowledgment being given his representatives are entitled to the charge after his death as against the remaindermen (*o*)

Tenant for  
life paying  
off charge

So, if a mortgagee in possession purchases a life estate in the equity of redemption time will not run during the continuance of the life estate against those entitled in remainder to the equity of redemption (*p*)

Mortgage in  
form of trust  
for sale

**299** A mortgage made by conveyance to a trustee in trust to sell and to pay to the mortgagee the principal of the mortgage debt and interest and to hand over the surplus to the mortgagor is within the above limitation (*q*) In such a case when the mortgagor's right of redemption is barred the trust for the surplus money is also extinguished (*r*)

Receipt of  
rents by  
solicitor of  
mortgagor

**300** When a solicitor to facilitate a transaction in which he is employed himself pays off the mortgage debt of a client and then receives the rents of the property he is treated as having acted as agent for his client and therefore time does not run in his favour as mortgagee in possession (*s*)

Mortgaged  
property  
descending as  
personalty of  
mortgagee

**301** If a mortgagee of land enters into possession and after his death the right of the mortgagor is barred by the statute the land, as between his representatives is treated as part of the personal estate (*t*)

Disabilities

**302** There is no provision in the Real Property Limitation Act 1874 (*a*) s 7 for disability of the mortgagor or his heirs and the provisions already referred to (*b*) relating to disabilities have no application to such a case (*c*)

(11) *Effect of Acknowledgment by Mortgagor*

Acknowledgment

**303** If an acknowledgment in writing of the title of the

(*n*) *Alderson v White* (1806) 2 De G & J 37 109

(*o*) *Burrell v Jermont (Earl)* (1844) 7 Lexp 200 *Carbery (Lord) v Ireston* (1800) 13 I Jq R 400 *Baldwin v Baldwin* (1850) 4 I Ch R 501 compare *Kensington (Lord) v Louisa* (1850) 7 De G M & G 134 O A *Clairie v Bodin* (1801) 13 I Eq R 492

(*p*) *Hyde v Dallaway* (1843) 2 Hue 528 See also on the Statutes relating to Real Property 2nd ed 115 *Haftley v King* (1806) 1 Keen 601

(*q*) *Loelling v Larler* (1872) 8 Ch App 30 *Re Ali on Johnson v Mounsey* (1879) 11 Ch D 284 O A

(*r*) *Chapman v Corpe* (1879) 41 I F 22 *Re Loveridge Pearce v Marsh* [1904] 1 Ch 518

(*s*) *Ward v Cartlar* (186 ) I R 1 Eq 29

(*t*) *A G v Vigor* (1803) 8 Ves 256 217 see *Re Loveridge Drayton v Loveridge* [1902] 2 Ch 809 *Re Loveridge Pearce v Marsh* [1904] 1 Ch 518 As to the extinction of the mortgagor's right to redeem a mortgage which includes both realty and personality see p 173 post

(*a*) 37 & 38 Vict c 57

(*b*) See p 133 ante

(*c*) *Kinsman v Rouse* (1881) 17 Ch D 104 *Forsler v Patterson* (1881) 17 Ch D 132

mortgagor or of his right to redeem has been given to the mortgagor or some person claiming his estate or to the agent of such mortgagor or person, signed by the mortgagee or a person claiming through him, the action to redeem may be brought within twelve years after the giving of such acknowledgment or the last of such acknowledgments, if there has been more than one (d)

If twelve years elapse after the mortgagee goes into possession and no acknowledgment of the mortgagor's title is made the title of the mortgagor to the land or rent is extinguished and a subsequent acknowledgment will not revive his title (c)

**304** An acknowledgment in order to keep alive a mortgagor's right to redeem must be signed by the mortgagee or other person claiming through him. An acknowledgment signed by his agent is not sufficient (f). It must be given to the mortgagor or his agent if given to a third person it is of no avail (g) and an acknowledgment by a mortgagee in a deed assigning the mortgage and the mortgaged property to a third person, the mortgagor not being a party (h) or an acknowledgment by the mortgagee to the mortgagor after the mortgagor has become bankrupt is insufficient (i). In order that the person to whom an acknowledgment is made should be the agent of the mortgagor it is sufficient if he has acted or has been treated as such by the person making the acknowledgment (k)

If a mortgagee has entered into possession accounts of his receipt of rents are not a sufficient acknowledgment unless they are signed by him and lost or communicated to the mortgagor or his agent (l)

**305** No particular form of acknowledgment is required but any expression in writing would seem sufficient if from it there may fairly be inferred an admission of the right to redeem in the persons to whom the expression is communicated (m). In judging whether a document is a sufficient acknowledgment the court will look at the circumstances in which it was written and will construe it in the way in which the writer intended it to be construed by the person to whom it is addressed (n)

(d) Real Property Limitation Act 1914 (37 & 38 Vict c 57) s 7 substituted for the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 28 as to which see *Batchelor v Middleton* (1948) 6 Hare 10. For a form of acknowledgment see *Encyclopædia of Forms and Precedents* Vol I p 190

(e) *Sanders v Sanders* (1881) 19 Ch D 373 C A. see *Kille v Farthorne* [1890] 1 Ch 219. *Beamish v Whitney* [1905] 1 I R 38. [1909] 1 I R 360. compare *Stansfield v Hobson* (1853) 3 De G M & G 620 C A. As to the old law see *Endleton v Roath* (1859) 1 De G 1 & J 81 C A

(f) See *Richardson v Lounge* (1871) 6 Ch App 418 per MILLER L J at p 480

(g) *Batchelor v Middleton* *supra* at p 80. see *Hilson v Walton and Kirkdale Permanent Building Society* (1903) 19 T L R 408. *Re Metropolitan and Counties Permanent Investment Building Society* *Gatfield & Co* [1911] 1 Ch 689

(h) *Lucas v Dennisen* (1843) 13 Sim 584

(i) *Markwick v Hardingham* (1880) 15 Ch D 339 C A

(k) *Trulock v Robey* (1841) 13 Sim 402

(l) In *Baker v Welton* (1841) 14 Sim 426 this question was raised but not decided. see Sugden on the Statutes relating to Real Property 2nd ed 117, *Le Alston Johnson v Mounsey* (1879) 11 Ch D 284 C A

(m) *Stansfield v Hobson* *supra*. *Thompson v Bowyer* (1863) 9 Jur (N S) 863. For some suitable forms see *Encyclopædia of Forms and Precedents*, Vol I pp 189 *et seq*

(n) *Trulock v Robey*, *supra* per SHADWELL V -O, at p 406

## SECT 14 Mortgagor and Mortgagee

Acknowledg  
ment after  
lapse of  
twelve years

What is  
sufficient  
acknowledg-  
ment

Account of  
rents

Form

## SECT 14

**Mortgagor  
and  
Mortgagee**

To one of  
several  
mortgagors  
By one of  
several  
mortgagees

**306** If there are more mortgagors than one or more persons than one claiming through the mortgagor or mortgagors, such an acknowledgment, if given to any of such mortgagors or persons, is as effectual as if it had been given to all such mortgagors (o)

If there are more mortgagees than one or more persons than one claiming the estate of the mortgagee or mortgagees, such acknowledgment signed by one or more of such mortgagees or persons if entitled to separate interests is effectual, but only as against the party or parties signing and any person claiming under him or them or entitled to any estate to take effect after or in defeasance of his or their estate (p)

An acknowledgment by a person entitled jointly has no effect (q)  
When any such person who has given such acknowledgment is entitled to a divided part of the land or rent (r), and not to an ascertained part of the mortgage money the mortgagor or mortgagors are entitled to redeem the divided part on payment with interest of such part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of the divided part bears to the value of the whole of the land or rent comprised in the mortgage (s)

**SECT 15 —Property of Spiritual and Eleemosynary Corporations  
Sole**

Period of  
limitation

**307** No archbishop bishop dean prebendary parson vicar master of hospital or other spiritual or eleemosynary corporation sole may take proceedings to recover any land or rent (a) belonging to such corporation except within the following period next after the time at which the right of such corporation sole has accrued, i.e. the period during which two persons in succession have held the office or benefice in respect whereof the land or rent is claimed and six years after a third person has been appointed thereto if such period with the addition of the six years amounts to sixty years, if such period with such addition does not amount to sixty years the period is to be extended to sixty years (b)

When time  
begins to  
run

**308** The period within which an action may be brought to recover land or rent belonging to a spiritual or eleemosynary corporation sole does not begin until the right has accrued (c) The time when

o) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 7

p) *Ibid*

q) *Richardson v Young* (1871) 6 Ch App 478

r) For the definition of rent see p 107 ante

s) Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 7

(a) For the definitions of land and rent see pp 106 107 ante As to tithes and tithe rentcharge see title ECCLESIASTICAL LAW Vol XI p 148 note (e) and see *ibid* p 742 note (c) see also pp 106 109 ante

(b) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 29 which excepts spiritual and eleemosynary corporations sole from *ibid* s 2 (now the Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 1) the period of limitation under the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 29 is never less than sixty years Claims by spiritual and eleemosynary corporations aggregate (see title CORPORATIONS Vol VIII p 304) are regulated by the general provisions of the Real Property Limitation Acts 1833 (3 & 4 Will 4 c 27) and 1874 (37 & 38 Vict c 57)

(c) Real Property Limitation Act 1833 (3 & 4 Will 4, c. 27) s 29

the right is deemed to accrue in each particular case must be determined by the general statutory rules relating to the accrual of a right (*d*) and by the statutory provisions as to acknowledgments (*e*). When the remedy is once taken away the whole right to the inheritance in the land or rent is extinguished (*f*).

**309** If at the time when any estate becomes vested in the Ecclesiastical Commissioners (*g*) the corporation sole to which the estate belonged had a right of action against a trespasser on property belonging to the corporation and this right is not then barred, the Commissioners by virtue of statutory powers (*h*) vested in them are not barred until the expiration of sixty years from the accrual of the right (*i*), but if property belonging to an ecclesiastical corporation sole is vested in a lay body by an Act which contains no such powers as those above referred to the period of limitation applicable to the lay body for the recovery of land or rent is twelve years from the accrual of the right of action (*k*).

SECT 15.  
Property of  
Spiritual  
and  
Eleemosy-  
nary Cor-  
porations  
Sole

Ecclesiastical  
Commis-  
sioners

Special power  
not generally  
applicable

#### SECT 16—*Presentations and Advowsons*

**310** If a stranger usurps a presentation to a benefice the rightful patron can recover the benefice by an action of *quare impedit*, provided he pursues his remedy within six months from the institution of the usurper's presentee. But even if the rightful patron does not do so the usurper gains no right to the advowson nor anything more than the benefit of a single presentation (*l*). This provision applies if a mortgagor of an advowson who is equitably entitled to present to a benefice brings an action to compel a presentee to resign (*m*).

Rights of  
patron on  
usurpation

The time from which the statute begins to run on the occasion of an adverse presentation is the time when the clerk obtains possession of the benefice and this it seems is the time of induction which is the act by which the clerk is made complete incumbent (*n*).

When time  
begins to run

**311** The limitation on the right of a person to bring an action to enforce a right to present to an ecclesiastical benefice is three incumbencies or sixty years (*o*).

Enforcement  
of right to  
present.

(*d*) See p 110 *ante*

(*e*) See p 131 *ante*

(*f*) See p 100 *post*

(*g*) See title ECCLESIASTICAL LAW Vol XI pp 794 *et seq*

(*h*) *Ibid* p 800

(*i*) *Ecclesiastical Commissioners of England and Wales v Paine* (1880) 5 App Cas 736 where Lord SALBORNE LC expressed an opinion that when once the Commissioners had gained possession of any land vested in them the Real Property Limitation Act 1833 (& 4 Will 4 c 27) s 29 no longer applied

(*k*) *Irish Land Commission v Grant* (1884) 10 App Cas 14

(*l*) See title ECCLESIASTICAL LAW Vol XI pp 586—589 Stat Westminister II (1285) 13 Edw 1 c 5 Advowsons Act 1708 (7 Ann c 18) R S O, Appendix A Part III s 4

(*m*) *Gardiner v Griffith* (1727) 2 P Wms 404, *Boteler v Allington* (1741) 3 Atk 453 As to mortgages of an advowson see p 173 *post*

(*n*) *Watson Clergyman's Law* c 16 p 100

(*o*) See title ECCLESIASTICAL LAW Vol XI pp 589 590 and see *ibid*,

## SECT 16

## Presentations and Advertisements

## Adverse possession

There are no provisions either for disabilities or acknowledgments in actions with respect to rights of presentation

**312** The old doctrine of adverse possession applies in cases of advowsons (*p*) and time does not run against a patron's right to present from the mere fact of a benefice being in the hands of a clerk who did not obtain possession from such patron or his predecessor but only if such possession was obtained adversely to the patron's title

## Joint ownership.

If an advowson is vested in two or more coparceners, joint tenants or tenants in common and a partition is made between them each of them is separately seized of her or his right to present in turn independently of the rest (*q*) and such presentation is in no way inconsistent with the right of the other or others to present in turn subsequently. But although a presentation by one coparcener, joint tenant or tenant in common in turn is never considered adverse to the right of the partner in title and although a presentation adverse to one entitled to present on any vacancy is not adverse to the right of another person entitled to present yet for the purpose of the statutory period of limitation of one hundred years (*r*) a presentation adverse to one of such parties has the same effect as if it had been adverse to all

## Remainder after estates tail

**313** A person claiming an estate in an advowson which the owner of an estate tail might have married is to be deemed to claim through the person entitled to such estate tail and is barred by presentations adverse to the tenant in tail (*s*). But it seems that if such tenant in tail alien the estate and creates a base fee the persons presenting in right of such base fee do not present adversely to the right in remainder and if this is so that right can never in such circumstances be barred as long as the base fee lasts the law concerning advowsons being in this respect different from that relating to other hereditaments (*t*)

## Presentation by Crown or universities of Oxford or Cambridge

**314** Where the right of presentation passes to the Crown in such cases as by forfeiture for felony (*u*) or by reason of the outlawry of the patron (*v*) a clerk presented by the Crown would it seems obtain possession adversely to the patron's right (*c*). When the

*p* 590 note (*r*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) ss 30-3. Before the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) there was no limit on time in such cases

(*p*) *Real* 50. As to adverse possession generally see cases cited in note (*r*) *p* 106 *ante*

(*q*) Advowsons Act 1408 (7 Ann c 18) see title ECCLESIASTICAL LAW Vol XI pp 571-572

(*r*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) s 33 see title ECCLESIASTICAL LAW Vol XI p 55

(*s*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 37 compare pp 130 *et seq* *ante*

(*t*) See p 105 *ante*

(*u*) Stat (1588-9) 31 Eliz c 6 s 4. The right to present is given for one turn only

(*v*) Com Dig Esglise (H 6) Watson Clergymen's Law c 11 p 104. But outlawry is now almost unknown see title CRIMINAL LAW AND PROCEDURE Vol IX, p 431

(*c*) As to the effect of presentation by the Crown on a lapse see title

right to present goes to either of the universities of Oxford or Cambridge for the reason that the patron is a Papist (*d*), the presentation is, it seems not adverse to the patron's right

SECT 16  
Presentations and  
Advowsons

# SECT 17—Title Extinguished by Dispossession

## SUB SECT 1—Extinguishment of Title

**315** At the determination of the statutory period (*e*) limited to any person for making an entry or bringing an action the right and title of such person to the land rent or advowson, for the recovery of which such entry or action might have been made or brought within such period is extinguished (*f*) and such title cannot afterwards be re-vested either by re-entry (*g*) or by a subsequent acknowledgment (*h*). A rentcharge is extinguished when the remedy to recover it is barred (*i*) and it seems that even when there is a covenant to pay a rentcharge the right of the covenantor to sue upon the covenant is then also destroyed (*k*)

Extinguishment of title.

## SUB SECT 2—Nature of Title Acquired

**316** The operation of the statute is merely negative it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him (*l*)

Nature of title acquired

ECCLESIASTICAL LAW Vol XI pp 590 note (a) 591 As to effect of a presentation by the Crown on the removal of an incumbent to a bishopric see *ibid* p 590 note (a)

(*d*) See title ECCLESIASTICAL LAW Vol XI p 506

(*e*) For the respective statutory periods see pp 103 123 126 178 13, 143 145 *loc ante*

(*f*) Real Property Limitation Act 15 (3 & 4 Will 4 c 21) s 31 *Daulings v Tenrhyn* (Lord) (1818) 4 App Ct 31 39 The earlier Limitation Act 1673 (21 Jac 1 c 16) s 1 only took away the remedy leaving the title in the owner who was out of possession but see *Doe d Harding v Coole* (1831) 7 Im 346

(*g*) *Blaington v Fleuclynn* (1805) 27 L J (Ex) 297 *Tryan v Coule* (1813) 21 W B 693 *de Jolly Guthercoe v Norfolk* [1900] 2 Ch 616 O A

(*h*) *Siniers v Sanders* (1851) 19 Ch D 1 C A *de Holbs Ho'l v Hald* (1851) 36 Ch D 503 see *Pe Mellure and Carrills v Grant* [1893] 1 I L 215 *Beaush v Whiney* [1905] 1 I L 38 [1909] 1 I L 360 Note how ever the effect of payment of rent under a tenancy from year to year (note *g*) p 126 *ante*) or payment of interest on a mortgage (p 146 *ante*) after non payment for twelve years

(*i*) *Shaw v Crompton* [1910] 2 K B 310 see pp 113 114 *note*

(*j*) See *Sutton v Sutton* (1852) 27 Ch D 311 C A see p 80 *ante*

(*l*) See *Dixon v Gaffere* (No 1) *Illier v Gordon* (1853) 14 Beav 421 *Tubborne v Har* (1892) 61 I L 735 C A It has been said that the effect of the statute is to execute a conveyance to the person in possession and not only to extinguish the right of the former owner but to transfer the legal fee simple (*Scott v Niron* (1843) 3 Dr & War 398 401 see *Doe d Jules v Sumner* (1841) 14 M & W 39 41 *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland v Richards* (1841) 1 Dr & War 258 259) But it is submitted that the true view is that stated in the text The statute which gives a wrongful holder a title to land does not give him a way of necessity (*Wilkes v Grenway* (1890) 6 T L R 449 O A) see title EASEMENTS AND PROFITS A PRENUKE Vol XI, p 289

## SECT 17

## Title Extinguished by Disposition

## Title forced on a purchaser

## Necessity to show state of title at commencement of possession

**317** A title gained by the operation of the statute is a good title both at law and in equity and will be forced by the court on a reluctant purchaser (m). But proof that a vendor and those through whom he claims have had independent possession of an estate for twelve years will not be sufficient to establish a saleable title without evidence to show the state of the title at the time such possession commenced. If the contract for purchase is an open one possession for twelve years is not sufficient in such case a forty years title by possession is required (n). Although possession of land is *prima facie* evidence of seisin in fee it does not follow that a person who has gained a title to land from the fact of certain persons interested in it being barred of their rights has got the fee simple vested in himself for although he may have gained an indefeasible title as against those who had an estate in possession there may be persons entitled in reversion or remainder whose rights are quite unaffected by the statute (o).

## Quantity of estate acquired

**318** The title gained by possession is limited by easements and other rights which still remain unextinguished (p) and is no larger than the interest which the rightful owner has lost by the operation of the statute and must therefore it seems have the same legal character and be freehold leasehold or copyhold accordingly (q).

## Leaseholds

But the person who gains by the statute the leasehold interest to property held on lease does not thereby become liable to be sued on the covenants of the lease the term is in no sense vested in him (r) though if such covenants are enforceable by a proviso for re-entry on breach of any of them the person who so gains a title may indirectly be forced to perform such covenants to preserve his interest from being destroyed by ejectment. A title acquired by adverse possession does not destroy the right of persons entitled to the benefit of covenants to enforce them against the land (a).

(m) *Sott v. Nisbet* (1851) 3 Tr & W 358 *Jethilridge v. Mansel* (1855) 20 I J (Q B) 59 see *Luttrell v. Rogers* (1844) 1 Tr & Tr 36 12 *Games v. Pountney* (1851) 14 L J (Ch) 211 C A *Sants to Thompson* (1851) 22 Ch D 614. When property is purchased compulsorily under the Lands Clauses Consolidation Act 1845 (5 & 6 Vict c 15) and the purchase money is paid into court a person who has been in possession for the statutory period is entitled to an order for payment out under *ibid* s 19 (*Re Harris Ex parte London County Council* (1903) 22 Sol Jo 116 *Re Metropolitan Street Improvement Act 1877 Ex parte Chamberlain* (1880) 14 Ch D 323) see *Ex parte Winder* (1881) 6 Ch D 696 *Gedye v. H. M. Commissioners of Works and Public Buildings* [1891] 2 Ch 630 C A and title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 116.

(n) *Jacob v. Russell* [1900] 2 Ch 508 see *Re Nisbet and Pct's Contract* [1906] 1 Ch 546 C A *Moulton v. Edmonds* (1859) 1 De G F & J 246 250 and title SALE OF LAND.

(o) See p 116 ante.

(p) See *Re Nisbet and Pct's Contract supra*.

(q) See *Handin v. M. Murtin* (1889) 21 L R Ir 290 297 *Walter v. Yalden*, [1892] 2 K B 304.

(r) *Fulborne v. Weir* (1892) 67 L T 735 C A *O'Connor v. Foley* [1900] 1 I R 1 *Williams v. Allen* (1889) 21 L R 200 compare *Re Hayden* [1904] 1 I R 1.

As to the effect of a person entering as against a tenant from year to year and paying rent see *Talbot v. M. Master* (1890) 28 L R Ir 116 C A *Mulcaire v. Lane Joynt* (1895) 32 L R Ir 683 C A.

(a) See *Re Nisbet and Pct's Contract supra*. This applies to restrictive covenants as well as to positive covenants, whether the restrictive covenants

When a person has possession of copyhold land for the statutory period without paying any rent or making any acknowledgment to the lord the interest which is acquired by such person is a freehold interest (b). The extinction of one service is no ground for presuming the extinction of other services to which the same land is subject or the extinction of the tenure to which the services are incident (c). However if for a very long period no rights of tenure whatever are exercised in respect of land held of a manor, and it is treated and dealt with adversely to the rights of the lord, an enfranchisement or release of tenure may be presumed (d).

SECT 17  
Title Ex-  
tinguished  
by Dis-  
possession  
Copyholds

**319** When two or more persons acquire a title under the statute by joint possession they become joint tenants of the property so acquired (e) unless they have a beneficial interest as tenants in common as in the case of next of kin (f).

Joint  
possession

### SECTION 3—Possession by Successive Transfers

**320** A person who is in possession of land without title has, while he continues in possession and before the statutory period has elapsed a transmissible and inheritable interest in the property but an interest which is liable at any moment to be defeated by the entry of the rightful owner and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period such a successor has then as good a right to the possession as if he himself had occupied for the whole period (g).

Statutory title  
is trans-  
missible

**321** If an intruder without title holds possession for less than the statutory period and then abandons possession and no other person immediately takes possession of the land as there is then no person against whom the rightful owner can bring in action the rightful owner is in the same position as if no intrusion had taken

Abandonment  
of trespasser's  
possession

are contained in a lease or in the conveyance of freehold. The Real Property Limitation Act 1933 (3 & 4 Will 4 c 21) s 34 does not extinguish such covenants and it seems they are enforceable against the land in the case of a person who acquires a title by the statute. They are also similarly enforceable against a purchaser for valuable consideration from such a person without actual notice if such purchaser accepts a title for less than the full statutory period (forty years) and if by buying or a title for the full statutory period he would have had notice of the covenants (*Re Nisbet and Potts Contract* [1906] 1 Ch 366 C A) and see title LANDLORD AND TENANT Vol XVIII pp 382 383 390 SALE OF LAND

(b) *A G v Comline* (1880) 15 Ch D 150 C A

(c) *Chichester (Earl) v Hall* (1851) 17 I L J (O S) 121 and see title COPYHOLDS Vol VIII p 40

(d) *Roe d Johnson v Ireland* (1800) 11 East 280 *Re Lidiard and Johnsons and Broadleys Contract* (1889) 47 Ch D 254 In *Turner v West Bromwich Union Guardians* (1860) 9 W R 150 Wood V C held that no Statute of Limitation applies to such a case and see title COPYHOLDS Vol VIII p 114

(e) *Ward v Ward* (1871) 6 Ch App 789 *Bolling v Hilday* (1862) 31 W R 9 *Coyle v M Falden* [1901] 1 I R 298 *Smith v Savage* [1906] 1 I R 469

(f) *Smith v Savage* supra *Marten v Kearney* (1902), 36 I L T 117, see *MacCormack v Courtney* [1895] 2 I R 97

(g) *Asher v Whitlock* (1865) L R 1 Q B 1 *Keeffe v Kirby* (1857) 6 I C L R 591 *Clarke v Clarke* (1868) 2 I R O L 395 *Perry v Olesold* [1907] A C 73 79 P O *Calden v Alexander* (1900) 16 T L R 294



**SECT 17**  
**Title Ex-**  
**tinguished**  
**by Dis-**  
**possession**

—  
 Possession by  
 series of  
 trespassers

place, and, although he is out of possession for the statutory period and another intruder subsequently takes possession but does not hold for the statutory period, the title of the rightful owner is unaffected by the statute (*h*)

**322** If a series of trespassers adverse to one another and to the rightful owner, take and keep possession of land in succession for various periods each less than but exceeding on the whole twelve years the rightful owner is barred (*i*) In such a case the person in possession at the expiration of the period of twelve years although he does not necessarily acquire a title by the statute may succeed in holding the property not by reason of the validity of his own title but by reason of the infirmity of the title of anyone else to eject him (*k*) It has been suggested that the earliest possessor within the twelve years has the best title (*l*) If in such a case the court is in possession of the property by a receiver and no one has acquired a statutory title it may determine the rights of competing claimants without regard to the statute and award the property to the person who would be entitled apart from the statute (*m*)

SUB SECT 4 — *Possession under Will Settlement or by Lessee*

Estoppel

**323** If a person takes wrongful possession of land and keeps it for the prescribed period of limitation not claiming to be himself entitled in fee but claiming a limited interest under some instrument it does not follow that he can by possession until the rightful owner is barred claim the whole estate in perpetuity (*n*) Whether possession was taken under the instrument or independently of it is it seems a question of fact in each particular case (*o*)

Trespasser  
and lessee

**324** A trespasser who has occupied without title and for less than the statutory period a plot of land belonging to another and who afterwards takes as tenant from the owner of the plot a strip of adjacent land is not thereby prevented from recovering as against his landlord by virtue of the statute a title to that plot (*p*)

(*h*) *Agency Co v Short* (1885) 13 App Cas 131 (C) see *Hillis v Howe (Earl)* [1893] 2 Ch 445 C A *Johnson (Samuel) & Sons Ltd v Broel* [1907] 2 Ch 333

(*i*) *Doe d Goody v Carter* (184) 9 Q B 563

(*k*) See *Dixon v Gayfer* (No 1) *Illiter v Gordon* (15) 17 Beav 421 *Asher v Whitlock* (1800) 1 R 1 Q 1 11 where some observations of ROMNEY MR in *Dixon v Gayfer* (No 1) *Illiter v Gordon supra* were criticised *Doe d Goody v Carter supra* *Doe d Carter v Barnard* (1549) 15 Q B 940

(*l*) See Pollock and Maitland *loc cit* in the Common Law 90 quoted by ILLINGFORD LJ, in *Dalton v Ist gerald* [1891] 2 Ch 86 C A at p 90

(*m*) *Dixon v Gayfer* (No 1) *Illiter v Gordon supra*

(*n*) As to the reasons for this see title ESCAPE Vol XIII p 374 If the interest claimed is a life estate under a will the devisee in remainder will be entitled to enter when that title determines see *Hanley v Hawlesbee* (1803) 11 Hare 230 *Anstee v Adams* (1806) 1 H & N 20 *Lourd v Board* (1873) L R 9 Q B 45 *Molony v Molony* [1894] 2 I R 1 The doctrine of *Board v Board supra* applies to instruments other than wills (*Dalton v Ist gerald supra per RIGBY LJ*, at p 90)

(*o*) *Anstee v Nelms supra*

(*p*) See title COMMONS AND RIGHTS OF COMMON Vol IV pp 533—535 and as to the effect of encroachments on adjoining land by a lessee see title LANDLORD AND TENANT Vol XVIII p 562

SUB SECT 5 *Registered Land*SECT 17  
Title Ex-  
tinguished  
by Dis-  
possessionRegistered  
land.

**325** A title to land adverse to or in derogation of the title of the proprietor registered under the Land Transfer Act 1897 (q), cannot be acquired by any length of possession and the registered proprietor may at any time make an entry or bring an action to recover possession of the land (r). But where a person would but for this provision have obtained a title to registered land he may apply for an order for the rectification of the register and on such application the court may subject to any estate or rights acquired by registration for valuable consideration order the register to be rectified accordingly (a).

SECT 18—*Lights of the Crown and the Duchy of Cornwall*

**326** The Crown (b) cannot sue or lay claim to any part of other real property other than liberties or franchises except where the right or title has first accrued within sixty years before the commencement of proceedings unless the Crown has been misled by any such right or has taken the rents or profits within such period of sixty years (c).

Limitation to  
claim to  
manor or real  
property by  
the Crown

(r) 60 & 61 Vict c 60 see title REAL PROPERTY AND CHATTEL REAL

(s) Land Transfer Act 1897 (60 & 61 Vict c 60) s 12 which re-enacts the Land Transfer Act 1875 (35 & 36 Vict c 5) s 21 but contains some additional provision

(a) Land Transfer Act 1897 (60 & 61 Vict c 60) s 12 There is another provision that this section is not to prejudice as against any person registered as first proprietor of land with a possessory title only any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place. There does not appear to be any judicial interpretation of the Land Transfer Act 1897 (60 & 61 Vict c 60) s 12 or of the corresponding provision Land Transfer Act 1875 (35 & 36 Vict c 5) s 21. In *Idle v State and Produce Co v Outler* [1907] A.C. 261 (C) it was held that twenty years adverse possession of land commenced after the registration of the title of a registered owner under the Honours and Titles Registry Act established a title adverse to the registered owner but this Act did not contain any provision like the Land Transfer Act 1897 (60 & 61 Vict c 60) s 12. As to what is possessory title adverse to registered title see *McIntyre v Jamnath* [1908] A.C. 60 (P).

(b) The Real Property Limitation Act 1875 (3 & 4 Will 4 c 57) and 1874 (37 & 38 Vict c 31) do not mention the Crown and therefore do not bind the Crown. Right against the Crown in respect of real property is governed by the Crown Suits Act 1769 (3 Geo. 3 c 16) commonly called the Nullum Tempus Act and the amendment Act (Duchy of Cornwall Act 1814 (7 & 8 Vict c 105) Duchy of Cornwall Act 1870 (2 & 3 Vict c 33) Crown Suits Act 1861 (24 & 25 Vict c 6) and s 6 title CONSTITUTIONAL LAW Vol VI p 110.

(c) Crown Suits Act 1861 (24 & 25 Vict c 16) s 1 and s 6 title CONSTITUTIONAL LAW Vol VI p 110. Formerly the right of the Crown was preserved if the rents had been in arrears to the Crown or had stood in deference of record within the period but this is no longer so (Crown Suits Act 1861 (24 & 25 Vict c 16) s 1) except in the case of rentcharges to which the latter Act does not apply (*Re Marwell's Estate* (1891) 28 L.R. 306 decided under the Nullum Tempus (Ireland) Act 1816 (39 & 40 Vict c 57)). This exception no longer exists in Ireland (Crown Lands Act 1906 (6 Edw. 7 c 28) s 9) see also *G v Lardley (Lord)* (1870) 8 Price 39 questioned in *Luttrell v Rogers* (1841) 1 Jo & Lat 36 82 *A G for New South Wales v Fore* [1898] A.C. 619 686 I.O. As to when rents are to be deemed in charge see *A G v Lardley (Lord)* *supra* *A G v Marwell* (1814) 8 Price 46 n but see *Luttrell v Rogers* *supra* Crown Suits Act 1769 (3 Geo. 3 c 16) s 10. The abolition of the doctrine of adverse possession by the Real Property Limitation Act 1833 (3 & 4 Will 4

**SECT 18**  
**Rights of**  
**the Crown**  
**and the**  
**Duchy of**  
**Cornwall**

**Remainders**

**Rents**

**Nature of**  
**title acquired**  
**against**  
**Crown**

When any remainder or reversion is vested in the Crown, or when it has granted any limited estate it is allowed a like period of sixty years to enforce its rights from the time when the estate comes or ought to come into possession (*d*)

All fee farm rents or other rents which have been paid out of such manors, or other property within sixty years of any action brought to recover such rents are secured to the Crown (*e*)

After the lapse of sixty years the subject is secured in the quiet enjoyment of the property both against the Crown and against all persons claiming by colour of letters patent or of grants upon suggestions of concealment or wrongful detaining (*f*)

The manor and property to which the subject's title is established by the Act are to be held of the Crown on the same tenures as they would have been if the title confirmed had originally been valid at law (*g*)

**Rents part of**  
**manor**

**327** The Crown is not deemed to have been answered the rents or profits of any lands by reason only of the same having been part of any honour or manor or other hereditaments of which the rents or profits have been answered to the Crown (*h*)

**Accrual of**  
**title of Crown**  
**to property**  
**demised**

**328** The right or title of the Crown to any manors or hereditaments comprised in a lease granted by the Crown is not deemed to have first accrued until the expiration of such lease as against any person whose enjoyment of such hereditaments or whose receipt of the rents or profits thereof commenced during the term of the lease or who claims through any person whose enjoyment or receipt so commenced (*i*)

c 27) (see p 100 *ante*) has no relation to property belonging to the Crown and to gain a title against the Crown there must still be adverse possession. *Quære* whether the Crown Suits Act 1769 (9 Geo 3 c 16) applies to advowsons (*Hibson v Earl* (1819) 1 Jac & W 159). The Crown Suits Act 1769 (9 Geo 3 c 16) contains many provisions similar to those of stat (1623) 21 Jac 1 c 2 and a commentary by Sir F Coleridge (3 Co Inst 156—191) on the stat (1623) 21 Jac 1 c 2 explains most of the technical expressions used in the Crown Suits Act 1769 (9 Geo 3 c 16).

(*d*) *Ibid* ss 3 & 4. These provisions seem unnecessary as by the Act the statute only runs against the Crown from the time when the right accrues but they were borrowed from the stat (1622) 21 Jac 1 c 2 where they were needed as by it the rights of the Crown were barred when the subject had been sixty years in possession before the passing of the Act. see *Luthill v Rogers* (1844) 1 Jo & Est 36 83. A reversion to the Crown expectant on the determination of an estate tail granted by the Crown to a subject for services cannot be barred (see note (*r*) p 137 *ante*). In such a case time cannot run against the Crown until the time when the reversion falls in and an attempt to bar the reversion could have no effect.

(*e*) Crown Suits Act 1769 (9 Geo 3 c 16) s 7. see *Doe d William IV v Roberts* (1814) 13 M & W 520. 1 *G for British Honduras v Bristowe* (1880) 6 App Cas 113 1 C 3 Co Inst 191. A person may gain a title as against the Crown to the fee simple of land but if such person and his predecessor in title have paid a quit rent which they were not bound to pay the Crown gains an indefeasible title to the quit rent (*Luthill v Rogers supra* decided on the construction of the corresponding Crown Claims Limitation (Ireland) Act 1808 (48 Geo 3 c 47) by SUDLN LC and BLACKBURN L MR).

(*f*) Crown Suits Act 1769 (9 Geo 3 c 16) s 1

(*g*) *Ibid* s 5

(*h*) Crown Suits Act 1861 (24 & 25 Vict c 62) s 3

(*i*) *Ibid* s 4

**329** If the Crown has been out of possession of real property for twenty years the person in possession can retain possession until the Crown has established its title by an information of intrusion, but this does not prevent the Crown or its grantee from making peaceable entry and then holding by virtue of title (*k*)

**SECT 18**  
**Rights of**  
**the Crown**  
**and the**  
**Duchy of**  
**Cornwall.**

**330** Limitations similar to those prescribed with regard to the Crown have been enacted with respect to claims by the Duke of Cornwall to lands and other hereditaments within the county of Cornwall other than liberties or franchises, mines, minerals, stones, and subterranea (*l*)

Right against  
Crown after  
twenty years  
possession

Claims by the  
Duke of  
Cornwall

## Part VI—Actions against Trustees

### SECT 1—*In General*

**331** The fact that the defendant is an express trustee (*m*) for the plaintiff will prevent the action from being barred by lapse of time whether the claim is to recover land (*n*) or personal estate (*o*) or is in respect of a breach of trust (*a*) if the defendant still retains the property or has converted it to his use or if the claim is founded on fraud (*b*). In other cases the existence of an express trust does not prevent the action being barred by lapse of time (*c*) and in the case of money (including a legacy) charged on land or arrears of interest on money so charged or arrears of rent the mere existence of an express trust does not prevent time running (*d*)

When time  
does not run

### SECT 2—*The Trustee Act 1888*

**332** Except in two cases hereafter referred to (*e*), a trustee (*f*),

Effect of the  
Act

(*k*) *Emmerson v Maddison* [1906] A C 569 P C stat (1623) 21 Jac 1 c 14 see *Died Watt v Morris* (1835) 2 Bing (N C) 189

(*l*) Duchy of Cornwall Act 1844 (7 & 8 Vict c 100) ss 71 88 see title CONSTITUTIONAL LAW Vol VII p 267 There seems to be no limitation with regard to liberties or franchises

(*m*) As to what trusts are express for this purpose see pp 141 *ante* 164 *post* and titles EQUITY Vol XIII p 174 TRUSTS AND TRUSTEES

(*n*) Real Property Limitation Act 1833 (3 & 4 Will 4 c 21), s 20

(*o*) See *Banner v Berridge* (1881) 18 Ch D 204 262

(*a*) Judicature Act 1833 (36 & 37 Vict c 66) s 20 (2) see *Re Cross Harston v Tenison* (1892) 20 Ch D 109 121 C A

(*b*) Trustee Act 1888 (51 & 52 Vict c 59) s 8 (1) see p 163 *post*

(*c*) Trustee Act 1888 (51 & 52 Vict c 59) s 8 (1)

(*d*) Real Property Limitation Act 1874 (37 & 38 Vict c 51) s 10 see p 60 *ante* As to an annuity charged on land and secured by an express trust see p 141 *ante*

(*e*) See p 163 *post*

(*f*) For the purposes of the Trustee Act 1888 (51 & 52 Vict c 59) the expression trustee is to be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee but not the official trustee of charitable funds (*ibid* s 1) As to the application of this provision to a trustee in bankruptcy see title BANKRUPTCY AND INSOLVENCY Vol II p 100 note (*r*) to a director of a limited company see title COMPANIES Vol V p 235 to an executor see title EXECUTORS AND ADMINISTRATORS Vol XIV p 316 As to the position of partners see p 171 *post* and title PARTNERSHIP

**SECT 2**  
**The Trustee**  
**Act 1888**

or any person claiming through him (g), has the benefit of all rights and privileges conferred by any Statute of Limitation in the like manner and to the like extent as if the trustee or such person had not been a trustee or person claiming through a trustee (h). If the action or other proceeding is brought to recover money or other property and is one to which no existing Statute of Limitation applies (i) the trustee or anyone claiming through him is entitled to the benefit of the lapse of time as a bar to such action or other proceeding as if the claim had been for money had and received (k). The statute runs against a married woman entitled in possession for her separate use even if restrained from anticipation (l).

What  
actions  
are  
within the  
Act

**333** The following actions are within the above provision and are not maintainable after the expiration of six years from the alleged breach of trust — an action against a trustee for a declaration that he is liable to make good a loss from not realising residuary personal estate (m) an action against a trustee to make good losses arising from investments negligently made (n) an action against executors who are also trustees for an account and payment of a share of personal estate (o) an action against trustees for improperly paying annuities in full without deducting income tax out of the dividends of securities on which income tax was deducted (p) an action against a first mortgagee who sells the mortgaged property under a power of sale and without fraud on his part allows his solicitor to retain the surplus after payment of the first mortgage on the representation of the solicitor that he had the authority of the second mortgagee to receive it (q) an action brought against a director of a company for an act which is *ultra vires* but not fraudulent (r).

(g) The exception in any person claiming through him does not apply to *cestui que trust* but to persons deriving property from and subject to the liabilities of the trustee and his executors administrators and assigns (*Leahy v De Moleyns* [1906] 1 I R 206 C A).

(h) Trustee Act 1888 (51 & 52 Vict c 59) s 8 (1) (a). The effect is the same as if an action for non fraudulent breach of trust were enumerated in the appropriate Statute of Limitation (*Hew v Winterton (Earl)* [1906] 2 Ch 626 C A. *Re Croysden Hill Lodge Roberts* (1911) 55 Sol Jo 652) as to form of account against trustees see *How v Winterton (Earl) supra*. *Re Davies Ellis v Roberts* [1898] 2 Ch 142 see also *Sovereign Life Insurance Co v Hulme* (1893) 9 T L R 305. The provision applies to actions or other proceedings commenced after the 1st January 1890 (Trustee Act 1888 (51 & 52 Vict c 59) s 8 (3)) and it does not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitation (*ibid*).

(i) See *Re Lunnis Nixon v Smith* [1902] 1 Ch 116.

(j) Trustee Act 1888 (51 & 52 Vict c 59) s 8 (1) (b). The period applicable to such a claim is the six years provided by the Limitation Act 1623 (21 Jac 1 c 16), s 3 see p 3 ante see also title CONTRACT Vol VII pp 413 *et seq*.

(k) Trustee Act 1888 (51 & 52 Vict c 59) s 8 (1) (b).

(m) *Pe Swan Swan v Linneman* [1891] 3 Ch 23 see *Re Page Jones v Morgan* [1893] 1 Ch 304. *Callings v Wade* [1896] 1 I R 340 C A.

(n) *Re Somerset Somerset v Louttit (Earl)* [1894] 1 Ch 231 C A. As to losses caused by the fraud of an agent of the trustee who has no knowledge of the fraud see *Re Fountaine Re Dowler Fountaine v Amherst (Lord)* [1909] 2 Ch 382 C A.

(o) *Re Lunnis Nixon v Smith supra* compare *Re Croysden Hincks v Roberts supra* see title EXECUTORS AND ADMINISTRATORS Vol XIV p 265.

(p) *Re Sharp, Rickett v Liffett* [1906] 1 Ch 793.

(q) *Thorne v Heard and Marsh* [1895] A C 495.

(r) *Re Lands Allotment Co* [1894] 1 Ch 616 C A. *Whitwam v Watkin* 98 78 L T 188, see title COMPANIES, Vol V p 235.

**334** In cases within the above provision time runs from the date of the breach of trust not from the time when the loss occurred to the *crista que trust* (s) but does not begin to run against a beneficiary unless the interest of such beneficiary is an interest in possession (t)

No beneficiary as against whom there would be a good defence by virtue of the above provision can derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and a defence grounded on the statute had been pleaded (u)

**335** If a claim against a trustee or a person claiming through him (v) is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy the above provision does not apply (w). So if trust funds are paid to a firm for purposes of investment and are fraudulently dealt with by one of the partners who makes a misrepresentation which prevents the discovery of the fraud the other partners are liable although they had no share in the fraud and time will not run till the fraud is discovered or might with reasonable diligence have been discovered (z). If an agent of a trustee acting in the scope of his employment commits a fraud the trustee is liable for it although he himself was not aware of it and the statute (a) has no application (b). But the trustee is not liable for a fraud committed by his agent if in committing it the latter was not acting as the agent of the trustee (c).

**336** The above provision (d) has no application when trust property or the proceeds thereof are retained by the trustee or

## SECT 2 The Trustee Act 1888

When time begins to run  
Person whose right is barred cannot benefit by another's action

Cases excepted from provision

Fraud

Trust property retained by trustee and received and converted

(s) *Re Somerset Somerset v Ioulett (Earl)* [1894] 1 Ch 1 C A *Hunt v Campbell* (1892) 9 L R 311 *Thorne v Hard and Marsh* [1890] A C 490 *Collins v Hall* [1890] 11 L R 410 C A

(t) Trustee Act 1888 (s1 & s2 Vict c 59) s 8 (b) *Collings v Wade supra* *Re Somerset Somerset v Ioulett (Earl) supra* *Hunt v Campbell supra* see *Mara v Irowne* [1890] 2 Ch 69 (reversed on another point [1896] 1 Ch 199 C A). He may however be barred by laches (*Re Laylor Allen & Lord* (1900) 81 L R 512).

(u) Trustee Act 1888 (s1 & s2 Vict c 59) s 8 (2). As to the meaning of this proviso see *Collins v Wade supra* and *Re Somerset Somerset v Ioulett (Earl) supra* *Hunt v Campbell supra* *Le Deu & Ducrey v Poebul* [1909] 1 Ch 325 336 *Le Wittane Le Douler Le Wittane v Tricker (Lord)* [1901] 2 Ch 392 393 C A. Where the tenant for life is barred but not the remainderman the interest on fund retained by the trustee will be paid to him during the life interest (*ibid*). As to the form of order see 2d Section Judgments and Orders 6th ed, 1144.

(v) See note (g) p 162 ante.

(w) Trustee Act 1888 (s1 & s2 Vict c 59) s 8 (1) as to what is fraud within the Act see *Collings v Wade supra* *Re Sale Hotel Ltd* (1897) 46 W P 314.

(x) *Moore v Knight* [1891] 1 Ch 547 see *Plaw v Bimley* (1847) 2 Ph 334 the principle laid down in which case has not been affected by the Trustee Act 1888 (s1 & s2 Vict c 59) s 8 (*Moore v Knight supra* *Walsham v Stanton* (1863) 12 W R 63 C A). As to the position of partner generally see title PARTNERSHIP.

(a) Trustee Act 1888 (s1 & s2 Vict c 59)

(b) *Moore v Knight supra*

(c) *Thorne v Hard and Marsh supra* *Sims v Brutton* (1850) 5 Exch 802 and see title AGENCY Vol I p 212.

(d) Trustee Act 1888 (s1 & s2 Vict c 59) s 8 (1) see p 161 ante.

**§ 2.**  
**The Trustee**  
**Act, 1888**

Payment of  
interest by  
trustees

have been previously received by him and converted to his use (e) But this exception does not apply where trust funds advanced on mortgage are, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a firm of which the trustee is a partner (f)

**337** In the case of an improper investment by a trustee or any negligent act amounting to a breach of trust the payment of interest by the trustee to the *cestui que trust* is not such an admission of liability as to deprive the trustee of the benefit of the statute (g)

**SLCT 3 — Trusts Sufficient to Prevent Time Running**

Trust must be  
express

**338** In cases to which the Trustee Act 1888 (h) has no application, the Statutes of Limitation are ousted as between trustee and *cestui que trust* when there is an express trust constituted by the act of the parties (i) a constructive trust arising by implication of law will not oust the operation of the statutes, except where a constructive trustee enters into possession of property with knowledge of a trust affecting it (j)

(e) Trustee Act 1888 (s 1 & 52 Vict c 59) s 8 (1) *Thorne v Heard and Marsh* [1895] A C 190 *Hew v Winterton (Earl)* [1896] 2 Ch 626 C A *Re Iago Jones v Morgan* [1905] 1 Ch 304 *Le Lunnell* (1902) 18 F T R 100 *Wassell v Leggatt* [1896] 1 Ch 554 (where a husband took and retained his wife's separate property) It seems that the Trustee Act 1888 (s 1 & 52 Vict c 59) s 8 has no application if the action is brought against a person claiming through the trustee and such person at the time of the action still retains the trust property So if a person who with the consent of the trustees having lawfully been in possession of trust property during the lifetime of his wife the tenant for life remains in possession after his wife's death with knowledge of the trust he is bound to account for the whole of the arrears of the profits from the time of the death of his wife and not merely for six years (*M Arle v Gahran* [1905] 11 R 106) Trustee who being also annuitants receive the whole of their annuities without deducting income tax although the income tax was deducted out of the dividends from which the annuities were payable are not protected in respect of a claim for the refunding of the income tax (*Re Sharp Luckett v Luckett* [1901] 1 Ch 193 and see p 162 ante)

(f) *Le Gurney Mason v Mercer* [1893] 1 Ch 190

(g) *Re Somerset Somerset v Luckett (Earl)* [1894] 1 Ch 231 C A *Re Fountaine Le Douler Fountaine v Amherst (Lord)* [1909] 2 Ch 352 C A *Want v Campan* (1893) 9 T L R 274 see *Thorne v Heard and Marsh* supra see Trustee Act 1888 (s 1 & 52 Vict c 59) s 8 (1) (a)

(h) s 1 & 52 Vict c 59 see p 163 ante

(i) Judicature Act 1875 (36 & 37 Vict c 66) s 25 (2) see p 161 ante See *Townsend v Townshend* (1853) 1 Bro C C 500 *Bedford v Wade* (1800) 17 Ves 51 P C *Iefre v Iefre* (1853) 1 Drew 371 *Salt v Cavanagh* (1858) 1 D & Wal 668 *Yardley v Molla d* (1875) L R 20 Eq 422 *Sands v Thompson* (1883) 22 Ch D 614 *Churcher v Meritt* (1889) 42 Ch D 312 *Fatruck v Simpson* (1889) 24 Q B D 123 *Nugent v Nugent* (1884) 15 L R Ir 321 *Re Rowe Jacobs v Hind* (1889) 61 L T 581 C A *Lokey v Lokey* (1719) Prec Ch 518 *Hornden v Annesley (Lord)* (1806) 2 Sch & Lef 607 632 *Thomas v Thomas* (1855) 2 K & J 19 As to express trusts see p 141 ante titles EQUITY Vol XIII p 151 TRUSTS AND TRUSTEES

(j) *M Arle v Gahran* supra see *Bridgman v Gell* (1857) 24 Beav 302 *Wassell v Leggatt* [1896] 1 Ch 554 and as to constructive trusts see title EQUITY Vol XIII pp 154 155 As to the running of time where the tenant for life is presumed to have paid himself the trustee being consequently affected see p 72 73 ante and the cases cited in notes (a) (b) and (c) thereon, see also *Jenner v Akemar* (1864) 10 Jur (N S) 465

## PART VI — ACTIONS AGAINST TRUSTEES.

**339** A mortgagee is not a trustee of his power of sale for the mortgagor (*k*) Where in a mortgage deed there is an express trust that the surplus shall be paid to the mortgagor and the mortgaged property is sold the mortgagee is a trustee of any surplus for the mortgagor and if the mortgagee retains the surplus or converts it to his use no Statute of Limitation can be set up as a bar to a claim against him (*l*) But where in the case of such a mortgage the mortgagor's right to redeem is extinguished by the possession of the mortgagee for twelve years, the power of sale and the trusts of the surplus are also extinguished and no claims can be made by the mortgagor in respect of a sale made after such extinction (*m*)

SMOKE.  
Trusts  
Sufficient to  
Prevent  
Time  
Running

Mortgage  
Trust of  
surplus

**340** Where a *cestui que trust* has a direct remedy in equity independently of that of the trustee against a person who is liable to pay trust moneys (*n*) and the relation between the *cestui que trust* and the debtor is such as merely to give the *cestui que trust* a remedy analogous to some legal remedy the Statutes of Limitation apply to the equitable claims of the *cestui que trust* subject to the same rules relating to disabilities and accrual of the right of action as govern a legal right (*o*) But the relation between the *cestui que trust* and the debtor may be of such a fiduciary nature as except in cases falling under the Trustee Act, 1888 (*p*), to exclude the operation of the Statutes of Limitation altogether (*q*)

Statutes of  
Limitation  
and equitable  
remedies of  
*cestui que*  
*trust*

**341** Where any person as agent (*r*) guardian (*s*) or in any other fiduciary capacity is in receipt of money for which it is his duty to account no lapse of time so long as the relation of confidence exists between the parties can bar the right to an account from the beginning of the transactions (*t*) nor will the statute begin to run when

Persons  
in fiduciary  
capacity

(*k*) *Harner v Jacob* (1882) 20 Ch D 220 *Martinson v Cloues* (1882) 21 Ch D 857 860 *Nash v Linds* (1880) 20 Sol Jo 90 C A *Colson v Williams* (1889) 58 L T (OH) 539 dis. origin. from the dictum of STUART V C to the contrary in *Robinson v Norris* (1858) 1 Giff 421 As to a mortgage of a ship see *Banner v Berridge* (1881) 18 Ch D 204 and title SHIPPING AND NAVIGATION

(*l*) *Pe Bell Lake v Bell* (1856) 31 Ch D 462 *Lanuer v Lordville* supra *Charles v Jones* (1857) 35 Ch D 41 *Thorne v Heard* [1894] 1 Ch 599 607 C A A mortgagee when there is a surplus and there are other mortgages is trustee of the surplus for the other mortgagees see *Thorne v Heard and Marsh* [1895] A C 435 and as to mortgages generally see title MORTGAGE

(*m*) *Chapman v Corpe* (19) 41 I T 22

(*n*) As to which see title TRUST AND TRUSTEES

(*o*) *Burroues v Gore* (1855) 6 H L Cas 907 per Lord CHILLESFORD I C at p 940 and per Lord CRANWORTH at p 940 *Stone v Stone* (1869) 5 Ch App 74 see *Williams v Lapworth* [1900] A C 563 and see title EQUITY Vol XIII p 170

(*p*) 51 & 52 Vict c 59 see p 162 ante

(*q*) See *Brigman v Gill* (1857) 24 Beav 302 and p 166 post As to a covenant to pay money on trust see *Spickernell v Hotham* (1854) Kay 669 675 *Stone v Stone* supra see p 73 ante and *Burroues v Gore* supra

(*r*) See title AGENCY Vol I pp 186 et seq

(*s*) See title INFANTS AND CHILDREN Vol XVII pp 117 131 132

(*t*) *Mathew v Brise* (1851) 14 Beav 341 *Pelly v Buscombe* (1863) 4 Giff





he comes within the statutory protection (d) cannot, when he is called upon to account for such property avail himself of the lapse of time as a defence (e)

Receivers appointed under an order of the court are trustees (f), so are the directors of a company (g)

An executor is not a trustee of a legacy or share of residue so as to exclude the operation of the statute unless he is so appointed by the will or makes himself a trustee by an act of his own (h), nor is he such a trustee of undisposed of residue (i)

SECT 8  
Trusts  
Sufficient to  
Prevent  
Time  
Running

Receivers  
Directors  
Executors

#### SLCT 4—Trusts for Payment of Debts

**343** A transfer of property to trustees for payment of debts if made by a debtor in his lifetime and without the concurrence of the creditors gives the creditors no right to enforce the execution of the trusts but operates merely as a direction to the trustees pointing out the way in which they are to apply the property vested in them for the benefit of the debtor who alone stands towards them in the relation of *cestui que trust* (h). But when the trusts declared by the deed are to take effect only after the death of the settlor the persons in whose favour the trusts are declared are *cestui que trustent* (i) and when the creditors

Trust for  
payment of  
debts

(d) See p 161 ante

(e) *Re Dunn Haynes v Dixon* [1899] 2 Ch 561 *Sour v Ashwell* [1893] 2 Q B 90 (C A) *Wassell v Leggatt* [1896] 1 Ch 554 *M Arlile v Gailfran* [1901] 1 I R 106 *Irishman v Gill* (1851) 24 Beav 502 *Hartford v Lauer* (1865) 2 I R Lq 201 but see *Wara v Towne* [1896] 1 Ch 199 C A

(f) *Sapram v Iul* (1881) 15 Ch D 216

(g) See title COMPANIES Vol V p 226 If a company declares a dividend on its shares the declaration does not make the company a trustee of the dividend for the shareholders see title COMPANIES Vol V p 216 The secretary of a company is not a trustee (*Municipal Freehold Land Co Ltd v Irlington* (1890) 63 L T 235) nor is an auditor of accounts (*Leeds & State Building and Investment Co v Shepherd* (1881) 36 Ch D 187) and see title COMPANIES Vol V pp 244 269

(h) *I Hulton v Munro* (1831) 2 My & Cr 309 *Fyson v Jackson* (1861) 30 Beav 364 *Re R we Jarvis v Lind* (1869) 60 L T 596 affirmed (1 L T 581) C A *Re Markay McKay v Gault* [1906] 1 Ch 2531 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 265 and cases here cited As to the position of a personal representative who has committed a devastavit see *ibid* p 316 and p 40 ante As to an executor de son tort see *Doyle v Foley* [1904] 2 I R 95

(i) See title EXECUTORS AND ADMINISTRATORS Vol XIV p 284 As to the position of a deceased trustee's estate with regard to a breach of trust committed by him see *ibid* p 312 and see *Corwell v Llanilins* (1864) 11 I T 155 *Woodhouse v Woodhouse* (1861) 1 I R 8 Lq 514 *Re Bunge Gillard v Lawrenson* (1887) 57 I T 364 *Re Blale Blale v Puer* (1899) 60 I T 663 *Carroll v Hargrave* (1881) 5 I R Lq 548 C A *Smith v Coal and Banlon Rail Co* (1870) 5 I R Lq 65 76 C A *Butler v Carter* (1868) 1 I R Lq 276 the cases to the contrary effect (*Dunne v Doran* (1844) 13 I Lq R 545 *Brereton v Hutchison* (1854) 3 I Ch R 361 *Newport v Bryan* (1856) 5 I Ch R 119) have been overruled see *Carroll v Hargrave supra* and see title TRUSTS AND TRUSTEES

(k) *Garrard v Lauderdale (Lord)* (1830) Sim 1 *Henriques v Bensusan* (1872) 20 W R 350 *Re Simile's Trusts* (1888) 41 I J (OH) 667 *Johns v James* (1888) 8 Ch D 744 C A see 2 White & Tud L C, 7th ed 88, title BANKRUPTCY AND INSOLVENCY Vol II p 328

(l) *Re Fitzgerald's Settlement Fitzgerald v White* (1887) 37 Ch D 18 C A see *Synnot v Simpson* (1854) 5 H L Cas 121 *Presley v Ellis* [1897] 1 Ch 499

**SECT 4**  
**Trusts for**  
**Payment of**  
**Debts**

are parties to the assignment or it is communicated to them, the relation of trustee and *cestui que trust* is constituted between the assignee in trust and every one of the creditors (m). If the trust is for the payment of debts out of personal estate and the Trustee Act 1888 (i) does not apply, no Statute of Limitation will run against the right of any creditor to an account and to payment. But if any sum of money is charged upon or payable out of real estate and secured by an express trust, time will run as if there were no such trust (o).

**Debts barred**  
**at the date of**  
**the creation**  
**of the trust**

**344** When an assignment of property is made so as to raise a trust in favour of creditors in general, a debt barred at the date of the assignment will not be included unless there was something in the assignment sufficient to operate as an acknowledgment of the debt to the creditor or a direction to the trustees to include the debt among those to be paid (p).

**Trust of**  
**personalty for**  
**payment of**  
**debts**  
**Trust of**  
**realty**

**345** A trust of personal estate declared by will does not prevent the statute from being set up as a defence even as to debts upon which the statute had not taken effect in the testator's lifetime though he believed the personal estate of which the trust is declared to be realty and devised it as such (q) but a provision by a testator for payment of his debts out of his realty includes all debts recoverable at his death and as to debts not then barred the statute will run from the death (r). It is immaterial whether the provision is by a charge or by a trust as a trust does not in respect of money charged upon or payable out of land keep a debt alive longer than a charge (a).

**Direction to**  
**pay statute**  
**barred debt**

**346** A direction by a testator to pay a particular debt which is statute barred will take the debt out of the statute (b) and if a testator expresses a wish that a trust should include statute barred debts such debts will be payable out of the residue left after payment of all demands to which the estate is legally liable (c).

(m) *Acton v Woodgate* (1855) 2 M & K 492. — White & Tud I C 7th ed 889 and see title BANKRUPTCY AND INSOLVENCY Vol II pp 328 329

(n) 51 & 52 Vict c 59 see p 161 ante

(o) Real Property Limitation Act 1884 (s 4 & 35 Vict c 57) s 10 see p 83 ante as to express trusts see p 141 ante

(p) See *Scott v Jones* (1834) 4 Cl & Fin 382 31 H I. As to what is a sufficient acknowledgment see pp 63 50 92 103 ante. As to a trust in a will for payment of debts in general see *Burke v Jones* (1815) 2 Ves & B 275. *O'Connor v Haslam* (1851) 5 H L Cas 170 176 title EXECUTORS AND ADMINISTRATORS Vol XIV p 254

(q) *Scott v Jones supra Re Hepburn Ex parte Smith* (1884) 14 Q B D 394 see *Evans v Pwedd* (1858) 1 Beav 50

(r) *Re Pells Trevely v Balls* [1909] 1 Ch 791. *Legus Executors v Gore* (1803) 1 Sch & Lef 101. *Hargreaves v Mitchell* (1824) Madd & G 326. *Hughes v Wynne* (1823) Turn & R 307 see *O'Connor v Haslam* (1850) 5 H L Cas 170

(a) Real Property Limitation Act 1874 (37 & 38 Vict c 51) s 10 see p 83 ante. *Re Stephens Warburton v Stephens* (1889) 40 Ch D 39. *Re Balls Trevely v Balls supra* title EXECUTORS AND ADMINISTRATORS Vol XIV p 254

(b) See *Millington v Thompson* (1802) 3 I Ch R 236

(c) See *Scott v Jones supra*, compare *Williamson v Naylor* (1838) 3 Y & C (ex) 408

If a testator makes provision for the payment of the debts of another person who is dead the provision will include all debts which are unbarred at the death of the original debtor (*d*)

SECT 4  
Trusts for  
Payment of  
Debts

Debts of  
another  
person

## Part VII — Equity and the Statutes of Limitation

### SECT 1 — In General

**347** The Real Property Limitation Acts 1833(*e*) and 1874(*f*) apply expressly to equitable as well as legal claims(*g*) The Trustee Act 1888(*h*) also applies to proceedings in equity

Application of  
statutes to  
equitable  
claims

The Limitation Act 1623(*i*) and the Civil Procedure Act 1833(*l*) dealing *inter alia* with certain actions which applied originally only to proceedings in courts of law(*l*) apply now to any action in the High Court which comes within their terms whether such action is brought in the King's Bench or in the Chancery

(*d*) *O'Connor v. Hallim* (1850) 5 II I Cas 10

(*e*) 3 & 4 Will 4 c 27 see pp 97 100 ante

(*f*) 31 & 38 Vict c 31 see p 82 ante

(*g*) See p 137 ante and title EQUITY Vol VIII p 175

(*h*) 31 & 38 Vict c 39 see p 161 ante

(*i*) 21 Jac 1 c 16 see p 85 ante

(*j*) 3 & 4 Will 4 c 42 see p 76 ante

(*l*) No Statute of Limitation before the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) (see p 100 ante) provided in terms for equitable rights or expressly bound courts of equity. Although the distinction between courts of equity and courts of law has been abolished (see *Waller v. Murdoch* *Murdick v. Warner* (1817) 4 Ch D 100 702 C A) the distinction between rules of equity and rules of law remains (*Seeley v. Rogers* (1881) 15 Q B D 250 C A *Re Greaves Deceased Bray v. Welch* (1881) 18 Ch D 551 554). It is therefore still of importance to consider the way in which courts of equity before the Judicature Acts viewed the Statutes of Limitation when these statutes did not expressly bind those courts (see *Hovenden v. Annesley* (1801) 2 Sch & Lef 607 per Lord REDESDALE J C at p 650 *Smith v. Clay* (1816) 3 Pto C C 639 n per Lord CAMDEN J C *Long v. Hylms* (1802) 1 Sch & Lef 415 429 *Chalmers v. Wainwright* (1810) 15 Q B D 250 C A 1 138 *Knowl v. Gye* (1812) L 1 J H 1 111 *Richard v. Sluiter* (1881) 36 Ch D 140, 186 C A *Brooks v. Mulliston* [1901] 1 Ch 519 522 *Molloy v. Mutual Reserve Life Insurance Co* (1906) 94 T T 51 C A). These courts frequently had occasion incidentally to decide purely legal rights as for instance in adjudicating on the validity of claims for debts brought in under decrees in administration suits. In such cases courts of equity decided all questions including questions on the statutes as if the claims were being enforced by an action at law where there was an analogous legal remedy within some Statute of Limitation and were bound to the exact period limited by the statutes and all the exceptions as to disabilities acknowledgments or otherwise applied equally with the mere limitation of time but in cases where there was no analogous legal remedy courts of equity were bound by no positive rules (*Smith v. Clay* *supra* *White v. Ives* (1610) 1 Vent 340 *Bonny v. Ridgard* (1784 88) cited in *Beclford v. Wade* (1801) 1 Ves 87 97 see *Hicks v. Sallitt* (1854) 3 De G M & G 782 C A *Thomas v. Thomas* (1850) 2 K & J 79 *McDonnell v. White* (1860) 11 H L Cas 570). As to the effect of the Judicature Act 1873 (36 & 37 Vict c 66) s. 3 see title Courts Vol IX pp 51 et seq.

SECT 1  
In General

**DIVISION (m)** In the case of actions which are not wit' in the terms of these statutes courts when administering equity often apply by analogy the limitations provided by these statutes (n) but this principle will as a rule be applied only where 'the equitable remedy which it is sought to enforce has some relation or similarity to a concurrent legal remedy (o)

SECT 2—Accounts

Accounts

**348** In actions for account the time for which an account will be granted may be (1) limited only by the accrual of the plaintiff's title (2) limited to six years or (3) limited to the period since the commencement of proceedings

Trust

**349** (1) Where some person has been in the receipt of money or in the management of property as trustee for the plaintiff in the suit or in some other confidential capacity the Statutes of Limitation do not apply, except in cases governed by the Trustee Act 1898 (p), s. 8 (q)

Where no trust.

**350** (2) Where there has been no trust the right to an account in equity is usually limited to six years by analogy to the provisions of the Limitation Act 1623 (r) which apply to actions of account at law (s). So if a purchaser for value has notice of the instruments on which the title of the rightful owner is founded and there is no fraud or suppression and no trust the account of rents will it seems be limited to six years prior to the commencement of proceedings (u). If the plaintiff has been under disability for some part of the time during which the land has been in the

(m) *Re Greaves Deceased Bray v Toft* (1851) 15 Ch D 501 504 *Gibbs v Guill* (188 ) 9 Q 1 D 79 *Perkins v J* at p 61 C A *Re Sharpe & Bennett Mason and General Life Assurance Co v Sharpe* [1892] 1 Ch 104 166 C A

(n) *Thomson v Eastwood* (1877) 2 App Cas 715 (interest on a legacy secured by express trust) *Allen v Line* (188 ) 36 Ch D 140 186 C A (recovery of property obtained by undue influence) *Higgin v Williamsen* (1850) 10 Ch D 91 *Re Hastings (Lady)* *Hillett v Hastings* (1857) 30 Ch D 94 105 C A (liability of separate estate of married woman) see *Rule v Jewell* (1881) 18 Ch D 660 667 *Perth v Slingsby* (1859) 25 L J 481 483 (specific performance)

(o) See title EQUITY Vol XIII p 175 *Meller v Brown* (1890) 10 Ch D 275 *Clarke v Watson* [1891] 1 Ch 10 *Re Stucley Stucley v Ailewich* [1906] 1 Ch 67 12 C A and p 40 ante

(p) 51 & 52 Vict c 59 see pp 161 note (h) 162 ante *Williamson v Barbour* (1857) 9 Ch D 57

(q) *Mithew v Irwin* (1851) 14 Beav 341 *Sturgis v Morse* (1858) 3 De G & J 1 C A *Wright v Charl* (1853) 4 Drew 613 650 In a suit for an account by a cestui que trust against a trustee on an express trust where there had been great delay in taking proceedings it was held that the account should not go further back than the filing of the bill (*Smith v Smith* (1871) 1 L R Ir 206 C A *Re Hastings (Lady)* *Hallett v Hastings supra*

(r) 21 Jac 1 c 16 see p 38 ante

(s) *Lorkey v Lorkey* (1811) Prec Ch 518 see *Knox v Gye* (1872) L R 5 H 1 614 *Smith v Smith* (1853) 1 L R Ir 206 *Reade v Reade* (1801) 5 Ves 744 *Harmood v Oglander* (1801) 6 Ves 199 215 *Burnell v Burnell* (1819) 11 Ch D 213 and p 38 ante

(u) *Hicks v Sallitt* (1854) 3 De G M & G 782 C A see *Nanney v Williams* (1856), 22 Beav 452

possession of the defendant and commences an action within six years after the disability ceased he is entitled to carry back the account through the whole period of disability (*b*) If he does not sue till more than six years after the cessation of disability the disability will not avail him at all so far as mesne profits are concerned (*c*) So in an action brought by a remainderman to recover land from a mortgagee of the life interest the remainderman is only entitled to rents for six years before the commencement of proceedings (*d*)

§ 12  
Accounts

**351** (3) When a person equitably entitled to an estate recovers it from one who has held it under a *bona fide* adverse possession without notice of the plaintiff's title and there is no trust or infancy and no fraud or suppression an account of the rents will not be carried back beyond the commencement of the proceedings (*e*)

Adverse  
possession  
without  
notice

**352** In actions for an account between partners the statute does not run until the partnership is determined (*f*) In actions for an account between a surviving partner and the executor of a deceased partner the statute runs from the death of the partner and the right of action is barred at the expiration of six years from the death (*g*) But if a partnership is determined by death and the surviving partner carry on the new partnership without tiling the accounts of the old and without interruption or settlement the statute has no application as between the surviving partners and the representatives of the deceased partner (*h*) If one partner unlawfully excludes another from the management or control of the partnership property time begins to run against a claim based on such exclusion from the act of exclusion (*i*)

Partners

**353** Lunacy is generally speaking no obstacle to an action being brought against a lunatic (*j*) Therefore in ordinary cases the Statutes of Limitation will run against a creditor of the lunatic (*k*) But if the creditor of a lunatic was or would have been restrained

Claim against  
lunatic

(*b*) *Thomas v Flom* (1855) 1 K & J 19 *Illy v Lascombe* (1863) 4 Giff 390 *Wright v Clark* (1860) 2 L J (11) 11 C A

(*c*) *Clay v Lacey* (1819) 1 Ecc (h) 513

(*d*) *Hillman v Hall* (1816) 4 Ch D 114 C A

(*e*) *Huls v Sallitt* (1854) 3 De G M & G 5 C A see *Jenny v Allen* (1851) 7 De G M & G 109 *Morgan v Morgan* (1810) 1 R 10 1 q 99

(*f*) *Noyes v Crutley* (1818) 10 Ch D 51 *Ann v Gye* (1812) 1 R 5 11 L 676 *Miller v Miller* (1869) 1 R 8 1 q 199 *Mullington v Holland* (1863) 18 W R 184 *The Longola* (1891) 13 L J 112 see title PARTNERSHIP

(*g*) *Knox v Gye* *supra* The clause of the Limitation Act 1623 (1 Jac 1 c 16) excepting merchants' accounts from the operation of the Act was abolished by the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) s 9 see note (*e*) pp 31, 38 ante

(*h*) *Beijermann v Beijermann* [1895] 2 Ch 474 C A

(*i*) *Barton v North Staffordshire Rail Co* (1888) 38 Ch D 458 463 *Clegg v Edmonson* (1857) 6 De G M & G 787 C A This is also the case in the analogous action by a shareholder against a company for refusal to register him as a shareholder see title COMPANIES Vol V p 695

(*j*) *Brockwell v Bull* (1869) 22 Q B D 567 C A see title LUNATICS AND PERSONS OF UNSOUND MIND pp 462 *et seq* post

(*k*) See *Bildero v Halpin* 1st Part *Haves* (1871) 19 W R 30 *Re Watson Stamford Union v Bartlett* [1819] 1 Ch 12 *Wandsworth Union v Northampton* [1906] 1 K B 420 *Re Harris* (1880) 49 I J (CH) 321 C A *Re Weaver* (1882) 21 Ch D 615 C A *Re J (a Person of Unsound Mind)* [1909] 1 Ch. 574 C A

**SECT 2**  
**Accounts**

from proceeding, the statute will not run against him during the lunacy (*m*) The bringing forward of a claim in lunacy after the death of the lunatic even though the claim is followed by a report in support of the claim, is not sufficient to prevent the claim from being barred by the statute as against the heir of the lunatic if the heir was not a party to the proceedings in lunacy (*n*) If a claim is made in lunacy in the lifetime of a lunatic and disallowed the statute continues to run and on the expiration of the statutory period the claimant will be barred in equity as well as at law (*o*) In passing the accounts of the committee of a lunatic a debt which is owing from the lunatic to the committee in his private capacity, and which is statute barred should be disallowed (*p*)

**SECT 3—Fraud**

**Equitable relief against fraud**

**354** In a case of fraud where a precise limitation of time is not provided by statute it is impossible to define when the person applying for relief in equity would be held to be too late (*q*), and, even in a case within the Statutes of Limitation the right of a person to upset a transaction on the ground of fraud or undue influence will not be barred while he remains ignorant of the fraud or while the undue influence continues (*r*)

**Fraud which takes a case out of the statutes**

In order to constitute such a case of fraud as will in equity be taken out of the Statutes of Limitation it is not enough that there should be merely a tortious act unknown to the injured party or enjoyment of property without title while the rightful owner is ignorant of his right there must be some abuse of a confidential position some intentional imposition or some deliberate concealment of facts (*s*)

**Time runs from discovery of fraud**

When the facts have once been discovered time begins to run from the date of such discovery as from the accrual of a new right and if the party entitled to relief then suffers the prescribed period to elapse without pursuing his remedy his right of action is entirely barred (*t*)

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- (*m*) *Stedman v Hilt* (1854) 1 Kay 60  
 (*n*) *Williamson v Williamson* (1841) 9 Iluc 204  
 (*o*) *Roe v Cole* (1841) 11 C & Sm 615  
 (*p*) See *Conjunct v Lowr* (1855) 1 Mol 121 *Lunacy Act 1890* (53 & 54 Vict c 5) s 116 and *Pe Kenrick a Lunatic* [1901] 11 P 480  
 (*q*) *Morice v Loyal* (1800) 12 Ves 33, 344  
 (*r*) *Roche v O'Brien* (1810) 1 Pull & B 330 *Plummer v Day* (1812) 2 Ball & B 104 *Itch v Itch* (1804) 9 Ves 292 See also *Reals and rent Real Property Limitation Act 1833* (3 & 4 Will 4 c 21) s 26 p 110 ante As to fraud and undue influence see title EQUITY Vol XIII, pp 10 et seq 169 et seq *FRATULEN A D VOIDABLE CONVULANCE* Vol XV pp 103 et seq *MISREPRESENTATION AND FRAUD*  
 (*s*) *Dian v Ihuarte* (1855) 1 Cray 621 see *Leuellin v Macduorth* (1740) 2 Eq Cas Abt 79 *Gordon v Gordon* (1821) 3 Swin 400 *Holfe v Gregory* (1865) 34 I J (CR) 21 *Ellen v Gregory* (1811) 1 Den 280 *Hatch v Hatch* (1804) 9 Ves 292 *Holfe v O'Brien* (1810) 1 Ball & B 330 *Charter v Trevelyan* (1814) 11 Cl & Fin 714 H L *Gresley v Mousley* (1838) 1 Giff 450 *Robertson v Norris* (1858) 1 Giff 421 *Tooley's Trustee v Whetham* (1886) 33 Ch D 111 12 C A *Larran v Larans Ltd* (1888) 40 Ch D 395 409 C A *Pernon v Vaudry* (1741) 2 Atk 119 *Alfrey v Alfrey* (1849) 1 Mac & C 51 *Keese v Keen* [1905] 1 Ch 245 *Blair v Bromley* (1841) 1 H & C 4 *Gibbs v Guild* (1851) 9 Q B D 59 and see title EQUITY Vol XIII p 110 notes (*u*) (*v*) and pp 49 143 ante  
 (*t*) *South Sea Co v Wymondsell* (1732) 3 P Wms 143 *Maillicott v O'Donel*

SECT 4 — *Mistake*SECT 4  
Mistake

**355** The payment of money or transfer of property under a mistake may be a ground for equitable relief but such relief will not be granted, if the application is made more than six years after the discovery of the mistake or the time when with reasonable diligence it might have been discovered (a)

Mistake

SECT 5 — *Mortgages of Personality and Advowsons*

**356** There is no statutory period of limitation applicable to an action for the foreclosure or redemption of a mortgage of personality and no statute which a court, when administering equity, can apply in such a case the statutory limitation applicable to an action for the foreclosure or redemption of land not being applicable by analogy to a mortgage of personality (b) But if real estate and personal estate are comprised in one mortgage for one sum the two properties being subject to the same proviso for redemption and the mortgagor is entitled to redeem the real estate is barred, equity will not decree a redemption of the personal estate (c)

Mortgage of personality

Mortgage of personality and realty

There is no statutory period of limitation for an action for the foreclosure or redemption of a mortgage of an advowson but a person bringing such an action may fail if he has been guilty of such delay as to amount to laches (d)

Mortgage of advowson

SECT 6 — *Agreement not to Sue*

**357** If creditors enter into a binding agreement not to sue a debtor for a certain time such an agreement can be pleaded as a defence to an action by the creditors and no Statute of Limitation will run during its pendency. Thus if a deed between a debtor and his creditors provides that in consideration of the debtor giving up his life interest in certain property for the payment of his debts licence should be given to the debtor to carry on his business without suit or molestation to his person or property and that if any of the creditors take proceedings to enforce their claims

Agreement not to sue

(1809) 11 All E.P. 176 *Clamart de Marquis v Harcourt* (1861) 6 Pous 17; see *Beaden v King* (1802) 9 Hare 49; *Wright v Hutton* (1880) 5 L.R. D. 319 C.A. *Leitchy Jessmer & Co Ltd* (1951) 50 L.T. 144 *Molloy v Mutual Life Insurance Co* (1906) 94 L.J. 756 C.A.

(a) *Brookbank v Smith* (1836) 1 Y. & C. (ex) 58 *Denys v Shuckburgh* (1840) 4 Y. & C. (ex) 41 *Hart v Harris* (No 2) (1861) 29 Beav 110 see *Baier v Combe & Co* [1910] 1 K.B. 56 An action brought by one cestui que trust against another to recover money wrongly paid to the latter by the trustee under a common mistake of fact is barred after six years from the payment but if such claim is made in an action in which the court is administering the trust estate and there are assets to which the overpaid cestui que trust is entitled the court will adjust the accounts between the parties and lapse of time will be no bar (*Re Robinson, McLaren v Public Trustee* [1911] 1 Ch 502) see further titles *LIQUIDATION* Vol. VIII pp 22 et seq **MISTAKE**

(b) *London and Midland Bank v Mitchell* [1899] 2 Ch 161 *Charter v Watson* [1899] 1 Ch 110 *Mellersh v Brown* (1890) 45 Ch. D. 210 *Re Stuckley* *Stuckley v Kelcey* [1906] 1 Ch. 67 C.A. *Re Hancock Hancock v Berrey* (1888) 59 L.T. 197 *Re Lake & Trusts* (1890) 60 L.T. 416

(c) *Charter v Watson* [1899] 1 Ch. 110 see p 149 ante

(d) *Brooks v Muchleston* [1909] 2 Ch. 519 522 see pp 106 163 ante.



**SECT 6** their debts should be forfeited creditors suing within the statutory  
**Agreement** period after his death can rely on the agreement as an answer to  
**not to Sue** a plea of the statute (e)

**SECT 7** — *Laches and Acquiescence*

**Laches.** **358** In some cases equitable relief will be refused on the ground of laches if the person seeking it has not come into court with reasonable speed after the facts have come to his knowledge especially if by his supineness the position of other persons has become changed (f)

## Part VIII — Penal Actions and other Proceedings

**SECT 1** — *Penal Actions*

**Proceedings in penal statutes** **359** All actions indictments and informations brought for any forfeiture upon any penal statute where the forfeiture is limited to the Crown only must be brought within two years after the commission of the offence against such statute. When the benefit is limited to the Crown and to any other person who prosecutes in that behalf the proceedings must be brought by any person who may lawfully sue within one year after commission of the offence and in default of such proceedings the action may be brought for the Crown within two years after the expiration of that year (g). If an action is limited by any penal statute to be brought within a shorter period than the times above specified the action must be brought within such shorter period (h).

**Where penalty given to party grieved** **360** All actions for penalties damages or sums of money given to the party grieved must be commenced within two years after the accrual of the cause of such actions unless the time for bringing such actions is specially limited by any statute (i) and subject in this case to the exceptions in favour of disabilities provided by the Civil Procedure Act 1853 (j) s 4 as amended

(e) *O'Brien v Osborne* (1852) 10 Hare 92 see *Iten v Elwes* (1854) 3 Drew 25 and p 65 *ante*

(f) See title EQUITY Vol VIII p 168. This jurisdiction is not affected by the Real Property Limitation Act 1833 (3 & 4 Will 4 c 21) see *ibid* s 21 and pp 144 173 *ante*

(g) Stat (1889) 31 Eliz c 5 s 5. If an act for which a penalty is imposed by statute is also an offence at common law the prosecution for such an act as an offence at common law is restrained by the stat (1588 9) 31 Eliz c 5 (Bulwer's Law of Nisi Prius 190). See further title CRIMINAL LAW AND PROCEDURE Vol IX p 294 note (c)

(h) Stat (1588 9) 31 Eliz c 5 s 5

(i) Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 3

(j) 3 & 4 Will 4 c 42 see p 78 *ante*. An action by a shareholder of a company to recover compensation from directors under the Companies (Consolidation) Act 1908 (6 Edw 7 c 69) s 84 is not within the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) s 4 but is within the Limitation Act 1623 (21 Jac 1 c 16) (*Thomson v Olanmorris* (Lord) [1900] 1 Ch 718 C A see p 39 *ante*)

by the Mercantile Law Amendment Act 1856 (l) When all the benefit goes to the informer and no part to the Crown the proceeding must be brought by the informer within one year (m)

SECT 1  
Penal  
Actions

**361** An action by an officer of the Goldsmiths' Company empowered by the Gold and Silver Wares Act 1844 (n) to sue dealers who have in their possession wares with forged marks is not within either of the above provisions and can be brought more than two years after the accrual of the cause of action (o)

Action by  
officer of  
Goldsmiths  
Company

**362** In the case of an information the proceedings are commenced by the filing of the information it is therefore at the date of this step that the statutory period is to be reckoned (p)

When time  
begins to run

## SECT 2—Criminal Proceedings and Crown Practice

**363** The rights of the Crown against a subject and the rights of a subject against the Crown are not affected by the ordinary Statutes of Limitation The Limitation Act 1623 (q) the Civil Procedure Act 1833 (r) and the Real Property Limitation Acts, 1833 and 1874 (a) do not bind the Crown The old rule *nullum tempus occurrit regi* (b) still prevails except where it has been altered by statute (c)

Rights  
between  
Crown and  
subject

**364** Except therefore where there is statutory provision to the contrary prosecutions for felonies and misdemeanours may in general be commenced at any time after the commission of the crime (d)

Criminal  
prosecutions

(l) 19 & 20 Vict c 97 s 10 see pp 56 78 *ante*

(m) *Dyer v Best* (1866) L R 11 Exch 152 see *Leuis v Davis* (1875) L R 10 Exch 86 Lx Ch *Robinson v Currey* (1881) 7 Q B D 46, C A per LAMWILL LJ at p 471 *Culliford v Blandford* (1692) Carth 232 S C *sub nom Culliford v Blandford* (1692) 1 Show 353 *Iool up v Frederel* (1667) 4 Burr 2018 Buller J of *Non Prius* 190 *Chance v Adams* (1796) 1 Ed Ryms 77 R v *Call* (1699) Salk 199 As to cases where the penalty is to be divided between the informer and someone else other than the Crown see *Barrett v Johnson* (1836) 2 Jo Lx Ir 197

(n) 7 & 8 Vict c 22 s 3 and see title CRIMINAL LAW AND PROCEDURE Vol IX pp 758 759

(o) *Robinson v Currey* (1881) 7 Q B D 46 C A and see note (n) p 77 *ante*

(p) Crown Suits etc Act 1860 (28 & 29 Vict c 104) ss 6 8 10 see generally title CROWN PRACTICE Vol X pp 20 *et seq* as to the old practice see *A G v Hall* (1823) 11 Price 760

(q) 21 Jac 1 c 16 see p 37 *ante*

(r) 3 & 4 Will 4 c 42 see p 174 *ante*

(a) 3 & 4 Will 4 c 27 and 37 & 38 Vict c 57 see p 159 *ante*

(b) Hob 347

(c) See *Re J (a Person of Unsound Mind)* [1909] 1 Ch 574 C A and titles CONSTITUTIONAL LAW Vol VI pp 374 375 410 CROWN PRACTICE Vol X p 34 see also p 41 *ante* As to claims against the Heir Apparent see title CONSTITUTIONAL LAW Vol VI p 369 note (n) As to the cases where the Crown is bound by the lapse of time see pp 41 159 *ante* As to the time at the expiration of which claims for estate and succession duties on real property in the hands of purchasers for value or mortgagees become barred see title ESTATE AND OTHER DEATH DUTIES Vol XIII pp 223 301

(d) See title CRIMINAL LAW AND PROCEDURE Vol IX p 294 As to a criminal information see *ibid* p 329

**SECT 2**  
**Criminal**  
**Proceedings**  
**and Crown**  
**Practice**

Summary  
proceedings  
Special  
proceedings

Acts done  
under  
statutory  
authority

Summary proceedings before justices must in the absence of any special limitation be instituted within six calendar months from the time when the matter of the complaint or information arose (e). There are special rules as to periods of limitation applicable to special forms of procedure for instance, election petitions (f), *certiorari* (g) *mandamus* (h) and *quo warranto* (i).

**SECT 3 —Special Periods of Limitation**

**SUB SECT 1 —Acts done under Statutory Authority**

**365** A special limitation of six months (k) is provided for any action, prosecution or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act duty or authority (l). This provision it seems does not apply to trading bodies even if acting under statutory authority but only to public bodies or public officers (m).

A number of statutes provide special limitations for proceedings in respect of acts done in pursuance of or in the execution of such statutes and these statutes though expressly repealed by the Public Authorities Protection Act 1893 (n), are only so repealed as to

(e) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 11 see *R (O'Reilly) v Fermanagh Justices* [1904] 1 P 18 (A) *West v Downman* (1880) 14 Ch D 111 C A and see generally title **MAGISTRATES**

(f) See title **ELECTIONS** Vol XII pp 412 493

(g) See title **CROWN PRACTICE** Vol X p 208

(h) *Ibid* p 111

(i) *Ibid* p 137

(l) In every Act passed after 1850 unless a contrary intention appears month means calendar month (Interpretation Act 1889 (52 & 53 Vict c 63) s 3) and see title **TIME**

(k) Public Authorities Protection Act 1893 (56 & 57 Vict c 61) (which is a Statute of Limitation see *Gregory v Torquay Corporation* [1911] 2 K B 556) see title **PUBLIC AUTHORITIES AND PUBLIC OFFICERS**

(m) *A G v Margate Pier and Harbour (Company of Proprietors)* [1900] 1 Ch 749 *Lyles v Southend on Sea Corporation* [1905] 2 K B 1 C A per VAUGHAN WILLIAMS LJ at p 13 *Kent County Council v Folkestone Corporation* [1905] 1 K B 620 C A *O'Brien v Mitchelstown Loan Fund* [1903] 1 I R 282 *Humphries v Worwood* (1894) 61 L J (Q B) 437. The Act applies to officials of a public authority when the officials are sued for an act done under statutory authority (*Greenuell v Howell* [1900] 1 Q B 535 C A *Wilson v 1st Edinburgh City Royal Garrison Artillery Volunteers* (1904) 7 F (Ct of Sess) 168) but not to the acts of independent contractors doing under a contract with the authority work which the authority has power to do (*Tilling (T) Ltd v Dick Kerr & Co Ltd* [1905] 1 K B 562 *Kent County Council v Folkestone Corporation supra*). As to actions for breach of contract see *Lyles v Southend on Sea Corporation supra* *Clarke v Lewisham District Council* (1902) 19 T L R 62 *National Telephone Co Ltd v Kingston upon Hull Corporation* (1903) 1 L G R 777. As to a private person acting in the performance of a public duty see *Salisbury v Gould* (1904) 68 J P 158.

(n) 56 & 57 Vict c 61 s 2 and Schedule *Ibid* s 2 repeals so much of any public general Act as in any proceeding to which the Act applies fixes any period for the commencement of the proceeding the schedule (*ibid*) contains a list of enactments parts of which are so repealed. As to the effect of such repeal see note (o) p 177 *post*.

Proceedings to which that Act applies and are therefore, it seems, still in force as regards private persons (o)

SECT 3  
Special  
Periods of  
Limitation

Limitation  
under local  
and personal  
Acts

**366** Various local and personal Acts contain different periods of limitation for actions brought for anything done in pursuance of such Acts but as regards all such Acts passed before the 10th August 1842 (p) one uniform period of limitation is provided namely, two years or in case of continuing damage, one year after such damage has ceased (q)

(o) See Coinage Offences Act 1861 (24 & 25 Vict c 99) s 33 (repealed) Constables Protection Act 1750 (24 Geo 2 c 44) s 8 (see *Parton v Williams* (1820) 3 B & Ald 330 338 *Gosden v Flphick* (1849) 4 Exch 445 *Smith v Wiltshire* (1821) 5 Moore (c p) 322 *Iregeard v Barnes* (1852) 7 Exch 827) Copyright Act 1842 (5 & 6 Vict c 45) s 26 County Courts Act 1888 (51 & 52 Vict c 43) s 53 (repealed) County Rates Act 1852 (15 & 16 Vict c 81) s 44 Cruelty to Animals Act 1849 (12 & 13 Vict c 92) s 27 (repealed) Customs Consolidation Act 1876 (39 & 40 Vict c 36) s 272 (repealed) Customs Inland Revenue and Savings Banks Act 1877 (40 & 41 Vict c 13) s 4 (repealed) Foreign Jurisdiction Act 1890 (53 & 54 Vict c 37) s 13 Game Act 1831 (1 & 2 Will 4 c 32) s 47 Habitual Drunkards Act 1879 (42 & 43 Vict c 19) s 31 Highway Act 1835 (5 & 6 Will 4 c 50) s 109 Inland Revenue Penalties Act 1890 (53 & 54 Vict c 21) s 2b (repealed) Larceny Act 1861 (24 & 25 Vict c 96) s 113 (repealed) Lunacy Act 1890 (53 & 54 Vict c 5) s 331 (repealed) Malicious Damage Act 1861 (24 & 25 Vict c 97) s 71 Metropolitan Building Act 1850 (18 & 19 Vict c 122) s 108 (repealed) (see *Williams v Colding* (1865) L R 1 C P 69) Metropolitan Management Amendment Act 1862 (25 & 26 Vict c 102) s 106 (repealed) (see Local Government Act 1888 (51 & 52 Vict c 41) s 40 (8) *Delany v Metropolitan Board of Works* (1867) L R 2 C I 532 affirmed L R 3 C P 111 *Ex Ch. Doust v Slater* (1863) 38 L J (Q B) 150 *Foulum v Thurst* (1867) L R 2 C P 449 *Whatman v Pearson* (1868) L R 3 C P 422 *Eduards v St Mary Islington Vestry* (1889) 22 Q B D 338 C A) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 53 (see *Barnett v Cox* (1846) 9 Q B 617) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 75 224 (repealed) Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) s 104 Prison Act 1865 (28 & 29 Vict c 126) s 50 (repealed) Public Health Act 1875 (38 & 39 Vict c 55) s 264 (see *Graham v Newcastle upon Tyne Corporation* [1893] 1 Q B 643 C A *Luton v Salford Corporation* (1883) 11 Q B D 286 *Crumbie v Wallsend Local Board* [1891] 1 Q B 503 C A *Lea v Facey* (1887) 19 Q B D 352 C A *Midland Rail Co v Withington Local Board* (1883) 11 Q B D 788 C A *Waterhouse v Keen* (1820) 4 B & C 200 *Davies v Swansea Corporation* (1853) 8 Exch 808 *Dearle v Petersfield Union Guardians* (1888) 21 Q B D 447 452 C A *Foat v Margate Corporation* (1893) 11 Q B D 299 *Oarr v Royal Exchange Assurance* (1862) 1 B & S 906) Submarine Telegraph Act 1885 (49 & 50 Vict c 49) s 6 (3) Taxes Management Act 1880 (43 & 44 Vict c 19) s 20 (repealed) The Acts which are marked in this note as repealed are repealed by the Public Authorities Protection Act 1893 (56 & 57 Vict c 61) but only it seems as to proceedings to which that Act applies see note (n) p 176 ante

(p) Limitations of Actions and Costs Act 1842 (5 & 6 Vict c 97) s 5 This Act so far as it relates to public authorities and public officers is it seems repealed by the Public Authorities Protection Act 1893 (56 & 57 Vict c 61) s 2 but remains in force as regards private persons

(q) See *Richards v Easto* (1846) 15 M & W 244 *Cock v Gent* (1843) 12 M & W 234 *Moore v Shepherd* (1854) 10 Exch 424 *Shepherd v*

## SECT 8

Special  
Periods of  
LimitationMeaning of  
act  
committedContinuance  
of injury or  
damage

**367** In many of the statutes which fix a special period of limitation such period commences from the act or fact committed, these words mean substantially the same as from the accrual of the cause of action (r) Thus if the cause of action as laid is the happening of the damage and not the mere doing of the act which causes the damage time will run not from the doing of the act but from the happening of the damage (s)

In some of the statutes which fix special periods of limitation time runs either from the act committed or if the injury or damage continues from the ceasing of the injury or damage (t) An action for false imprisonment if within the protection of a special statute may be commenced at any time within the special statutory period from the end of the imprisonment and the last day of the imprisonment is excluded in the computation of the period (a) In an action for illegal distress time runs from the sale of the goods and is not barred on the expiration of the special statutory period after the seizure (b) Continuance of injury or damage means continuance of a legal injury and not merely continuance of the injurious effects of a legal injury The continuance of the injurious effects of an accident is not a continuance of injury or damage within the meaning of the Public Authorities Protection Act 1893 (c) s 1 (d) If there is a continuance of a legal injury for example pollution of a stream and the action is commenced within the special statutory period of the ceasing of the continuing injury the plaintiff may recover damages not merely for the special statutory period but for the whole period for which damages could be awarded under the Limitation Act 1623 (e)

*Sharp* (1866) 1 H & N 115 Ex Ch *Roden v Smith* (1849) 18 I J C 101 *London & General Insurance Co* (1862) 1 B & S 156

(r) This is the expression used in the Limitation Act 1623 (21 Jac 1 c 16) and the Civil Procedure Act 1833 (3 & 4 Will 4 c 42) see pp 37 77 ante

(s) *Whitchouse v Ielloues* (1861) 10 C B (N S) 765 see *Crumble v Wall and Local Board* [1891] 1 Q B 303 (A) *Faulbrother v Bury Rural Sanitary Authority* (1889) 37 W P 541 *Bonomi v Backhouse* (1861) 1 H L Cas 303 *Darley Main Colliery Co v Mitchell* (1896) 11 App Cas 127 As to the construction of statutes generally see title STATUTES

(t) See Public Authorities Protection Act 1893 (56 & 57 Vict c 61) s 1 Limitations of Actions and Costs Act 1911 (1 & 6 Vict c 97) *Kennet and Avon Canal Co v Great Western Rail Co* (1845) 7 Q B 824

(a) *Hardy v Ryle* (1829) 9 B & C 603 *Bailey v Warden* (1815) 4 M & S 400 and see title RESIDUES

(b) *Fraser v Swansea Canal Co* (1834) 1 Ad & El 354 *Collins v Rose* (1839) 5 M & W 114 (distinguishing *Goding v Ferris* (1791) 2 Hy Bl 14) *Crook v M Tarish* (1823) 1 Bing 167 and *Saunders v Saunders* (1802) 2 East 254 see *Tolley v Fordham* [1904] 2 K B 345 As to illegal distress see title DISTRESS Vol XI pp 195 et seq

(c) 56 & 57 Vict c 61

(d) *Carey v Bermondsey Borough Council* (1903) 2 L G R 219 C A *Williams v Mersey Docks and Harbour Board* [1905] 1 K B 804 C A *Gawley v Belfast Corporation* [1908] 2 I R 34 C A *Marley v Toluworth Joint Isolation Hospital District Board* [1900] 2 Q B 454 compare title DAMAGES Vol X p 310

(e) 21 Jac 1 c 16 *Harrington (Earl) v Derby Corporation* [1905]

**368** A private person or company to whom special powers are given to carry out particular works when sued for some unauthorised act and when entitled to the benefit of a special period of limitation for an act done in pursuance or execution of the statute generally comes within the protection of the statute if in doing the act complained of the person or company was intending to carry out the particular works contemplated by the statute (f) or if in the case of a person he believed in the existence of a state of facts which if it had existed would have justified him in doing as he did (g). It is not necessary that he should have had reasonable grounds for his belief (h) or that he should have had the statute in his mind or have known of its existence (i).

**SECT 3**  
**Special**  
**Periods of**  
**Limitation**

Act done  
under the  
authority of  
a statute

An act may be done in pursuance of or in the execution of the powers granted by a statute although such act is prohibited by the statute (l). A person acting under statutory powers may erroneously exceed the powers given or inadequately discharge the duties imposed by a statute yet if he acts *bona fide* in order to execute such powers or to discharge such duties he is considered as acting in pursuance of the statute (l). Where a statute imposes a duty the omission to do something that ought to be done in order completely to perform the duty or the continuing to leave any such duty unperformed amounts to an act done or intended to be done within the meaning of a statute which provides a special period of limitation for such an act (ii).

Error of  
commission or  
omission

1 Ch 205 *Haque v Doncaster Rural District Council* (1908) 100 L T 121 compare *Willies v Hingford Water Co* (1871) 21 M & W 281 (overruled but not on this point by *Little v Metropolitan Rail Co (Directors etc)* (1867) L R 2 H L 175 181) *Blairmore v Glamorgan & Swansea Canal Co* (1829) 3 Y & J 60

(f) It has even been held that a company is entitled to such protection even though the acts complained of had been done improperly and in bad faith (*Oalley (Lord) v Kensington Canal Co* (1833) 3 B & Ad 158 but see *R v Eastern Counties Rail Co* (1841) 1 C & D 589)

(g) *Chamberlain v King* (1871) L R 6 C P 474 *Hughes v Bucland* (1816) 15 M & W 346

(h) *Roberts v Orchard* (1863) 2 H & C 769 17 Ch *Hermann v Seneschal* (1862) 13 C B (N S) 392 *Chamberlain v King supra* explaining *Lectre v Hart* (1868) L R 3 C P 322 compare *Agnew v Jobson* (1877) 47 L J (M C) 67

(i) *Roberts v Orchard supra* As to public officers see *Hardwick v Moss* (1861) 7 H & N 136 *Graves v Arnold* (1812) 3 Camp 242 *Irving v Wilson* (1791) 4 Term Rep 485 *Greenway v Hurd* (1792) 4 Term Rep 553 and see *Burns v Nowell* (1880) 5 Q B D 441 (A) *Selmes v Judge* (1811) 1 R 6 Q B 724 and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(k) *Gaby v Wilts and Berks Canal Co* (1815) 3 M & S 580

(l) *Smith v Shaw* (1829) 10 B & C 277 see *Theobald v Crickmore* (1818) 1 B & Ald 227 compare *Griffith v Taylor* (1876) 2 C P D 194 C A

(m) *Wilson v Halifax Corporation* (1868) L R 3 Exch 114 *Jolliffe v Wallasey Local Board* (1873) L R 9 C P 62 *Poulsum v Ihust* (1867) L R 2 C P 449 *Holland v Northwich Highway Board* (1816) 34 L T 137 *Edwards v St Mary's Islington Vestry* (1889) 22 Q B D 338 C A. Most of these cases are now provided for by the Public Authorities Protection Act 1893 (56 & 57 Vict c 61) s 1 of which not only relates to an act done in pursuance of a statute but also to any neglect or default

**SECT 8**  
**Special**  
**Periods of**  
**Limitation**

A person who is not acting under the orders or directions of a public authority but who commits a trespass while doing work required by a notice received from the authority, is not acting under the statute under which the notice is given (n). But if a contractor who is employed by a public authority to carry out work which the authority is authorised by statute to do is guilty of neglect or misfeasance, he is entitled to any special protection given by that statute (o) unless the negligence or misfeasance is collateral to the thing done or intended to be done under the statute (p).

**SUB SECT 2 — Miscellaneous Limitations**

**Actions**  
**against**  
**guardians**

**369** Any debt claim or demand which may be lawfully incurred by or become due from the guardians of any union or parish or the board of management of any school or asylum district is to be paid within the half year in which it was incurred or became due or within three months next after the expiration of such half year unless the Local Government Board extends the time: no action for such debt claim or demand will lie after the expiration of three months from the end of such half year unless the time of payment has been so extended (q) nor in such circumstances will a mandamus to pay such debt be granted (r). If any person claiming any debt claim or demand from such an authority commences proceedings within the period limited for payment and prosecutes such proceedings to judgment with due diligence the judgment may be satisfied although recovered after the expiration of that period and all proceedings by mandamus or otherwise for enforcing the judgment without delay are to be deemed proceedings within the operation of the statute (s).

**Expenses of**  
**highway**  
**authority**

**370** Proceedings for the recovery of expenses incurred in repairing a highway by reason of damage caused by excessive weight

in the execution of a statute but these cases may still be of importance with reference to neglect by contractors who are employed by a public authority: see note (m) p 176 *ante*. As to a mere act of nonfeasance see *Umphelby v M Lean* (1817) 1 B & Ald 42 and as to words spoken see *Royal Aquarium and Summer and Winter Garden Society v Parlison* [1892] 1 Q B 431 C A. As to what is an act done in pursuance of a statute see *Carruthers v Payne* (1828) 5 Bing 270 *Edge v Earler* (1828) 8 B & C 697.

(n) *Doust v Slater* (1869) 38 L J (Q B) 159

(o) *Poulsum v Thurst* (1867) L R 2 C P 449. The contractor in such a case does not come within the Public Authorities Protection Act 1893 (56 & 57 Vict c 61): see p 176 *ante*.

(p) See *Whatman v Leeson* (1868) L R 3 C P 422

(q) *Baker v Battersea Union Guardians* (1863) 2 H & C 642. As to guardians of the poor see title POOR LAW.

(r) *R v Stepney Union* (1874) L R 9 Q B 383

(s) Poor Law (Payment of Debts) Act 1859 (22 & 23 Vict c 49) s 4. See *Rhodes v Pateley Bridge Union Guardians* (1884) 51 L T 235. *West Ham Union v Bath Union* (1889) 53 J P 292. *Midland Rail Co v Edmonton Union* [1891] A C 485. *West Ham Union Guardians v St Matthew Bethnal Green (Churchwardens etc)* [1895] 1 Q B 662 C A. *Manchester Sheffield and Lincolnshire Rail Co v Doncaster Union Guardians* [1897] 1 Q B 117 C A. *Sharpington v Fulham Guardians* [1904] 2 Ch 449. *Dearle v Petersfield Union Guardians* (1888) 21 Q B D 447 C A. See title POOR LAW.

passing along the highway or extraordinary traffic thereon, or for the recovery of expenses of making a street are subject to special statutory limitations (a)

**371** Proceedings taken before justices to recover a civil debt must be commenced within six months of the accrual of the cause of action (b)

**372** An action under the Fatal Accidents Act 1846 (c) must be commenced within twelve calendar months of the death of the person in respect of whose death compensation is claimed (d)

An action for the recovery of compensation under the Employers Liability Act 1880 (e) must be commenced within six months of the occurrence causing the injury or in case of death, within twelve months from the death

Proceedings for the recovery of compensation under the Workmen's Compensation Act 1897 (f) are not maintainable unless the claim for compensation with respect to the accident is made within six months from the occurrence of the accident causing the injury, or, in case of death within six months from the death (g)

**373** A creditor is not entitled by any means whatsoever to obtain payment of his debt out of the property of a deceased seaman or apprentice if the debt accrued due more than three years before the death of the debtor or if the demand is not made within two years after the death (h)

**374** If an order is made by a court of summary jurisdiction (i)

(a) See title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 177 *et seq* 222 *et seq* 230 As to proceedings for the recovery of rates see *Sweetman v Guest* (1866) 1 P 3 O B 262 *Keeton v Sheffield Coal Co* [1901] 2 K B 26 and title PILLS AND RATING

(b) *R (O'Reilly) v Fermanagh Justices* [1904] 2 I R 18 C A *Harpin v Sykes* (1885) 11 L R 07 *West v Downman* (1880) 14 Ch D 111 C A An application for an affiliation order cannot in general be made after the expiration of twelve months from the birth of the child unless the putative father has paid for the child's maintenance see title BASTARDY Vol II p 444

(c) 9 & 10 Vict c 93 s 1 see title MASTER AND SERVANT

(d) If the action is brought against a public authority which is within the Public Authorities Protection Act 1893 (36 & 37 Vict c 61) the action must be brought within six months of the time of the injury which caused the death (*Williams v Mersey Docks and Harbour Board* [1900] 1 K B 804 C A *Manley v Tolworth Joint Isolation Hospital District Board* [1900] 2 O P 404)

(e) 43 & 44 Vict c 42 s 4 see title MASTER AND SERVANT

(f) 60 & 61 Vict c 3 s 2 (1) see title MASTER AND SERVANT

(g) See *Powell v Main Colliery Co* [1900] A C 366 *Wright v John Bagnall & Son Ltd* [1900] 2 Q B 240 C A and see p 182 *post* See also title MASTER AND SERVANT As to the recovery of deductions or payments contrary to the Truck Act 1896 (59 & 60 Vict c 44) see title FACTORIES AND SHOPS Vol XIV p 523

(h) Merchant Shipping Act 1894 (57 & 58 Vict c 60) s 178 This provision is it seems limited to property of a deceased seaman or apprentice with which the Board of Trade is empowered to deal see *ibid* s 169 As to summary proceedings under the Act, see titles MAGISTRATES SHIPPING AND NAVIGATION

(i) See title MAGISTRATES

### SMOKE 3 Special Periods of Limitation

Recovery of  
civil debt  
before  
justices  
Compensation  
for fatal or  
other injury

Workmen's  
Compensation  
Act 1897

Claim against  
property of  
deceased  
seaman

Claim under  
the Police  
(Property)  
Act, 1897



**SECT 3**  
**Special**  
**Periods of**  
**Limitation**

under the Police (Property) Act, 1897 (*k*), for the delivery up of property which has come into the possession of the police in connection with any criminal charge or in similar circumstances (*l*) a person who claims such property may in spite of such order take legal proceedings against anyone in possession of property delivered by virtue of the order, but only within six months from the date of the order (*m*)

**SUB SECT 3 —Disabilities Acknowledgments and Estoppel**

No provision  
in special  
enactments  
for disabilities  
etc  
Negotiations  
Estoppel.

**375** No provision for disabilities or acknowledgments is made in the enactments providing special periods of limitations

**376** Negotiations between a claimant and a person against whom a claim is made although such negotiations lead to delay and cause the claimant not to bring his action until the statutory period has passed do not bar the defendant from setting up the statute (*n*). There is no estoppel in such a case unless what has happened amounts to an agreement that the defendant is to be liable (*o*). Thus negotiations between a claimant and his employers shortly after an accident as to the amount of compensation to be paid under the Workmen's Compensation Act 1897 (*p*) may be evidence of an agreement that compensation is to be paid the only question left open being that of amount in such a case the employer may be estopped from setting up the defence that a claim was not made within the prescribed time (*q*)

## Part IX — Pleadings and Process

### SECT 1 —Pleading the Statutes of Limitation (*r*)

Statutes  
which bar  
the right not  
the cause of  
action

**377** The effect of those Statutes of Limitation which relate to personal actions other than actions on penal statutes (*s*) is not to extinguish the cause of action but to bar the right to maintain the action. The defence of the statute in such cases must be specially pleaded even if it appears on the face of the statement of claim that the cause of action accrued out of the time limited (*t*)

(*k*) 60 & 61 Vict c 30

(*l*) *Id* under the Metropolitan Police Act 1839 (2 & 3 Vict c 47) s 6 or the City of London Police Act 1839 (2 & 3 Vict c xciv) s 48 or the Larceny Act 1861 (24 & 25 Vict c 96) s 103 or the Pawn brokers Act 1872 (35 & 36 Vict c 93) s 34 see titles CRIMINAL LAW AND PROCEDURE Vol IX pp 684 *et seq* POLICE

(*m*) Police (Property) Act 1897 (60 & 61 Vict c 30) s 1

(*n*) *Hewlett v London County Council* (1908) 72 J P 136 see title ESTOPPEL Vol XIII pp 388 *et seq*

(*o*) See *Wright v Bagnall (John) & Sons Ltd* [1900] 2 Q B 240 C A

(*p*) 60 & 61 Vict c 37

(*q*) *Wright v Bagnall (John) & Sons Ltd supra*

(*r*) As to pleading generally see title PLEADING

(*s*) See *Maugham v Waller* (1793) Peake 220 [163] and as to penal statutes see p 174 *ante*

(*t*) *Stile v Finch* (1634) Cro Car 381 *Hawkings v Billhead* (1636)

## PART IX—PLEADINGS AND PROCESS

**378** In actions of contract and tort since the Judicature Acts, when it is wished to take advantage of the statute, it must be pleaded, except where the plea of the general issue by statute is admissible (a)

NOTE 1  
Pleading the  
Statutes of  
Limitation

In actions for the recovery of land the defendant may plead that he is in possession, and that plea has the effect of the general issue (b)

When statute  
must be  
pleaded  
General issue

There are certain cases in which a person when sued is allowed by a special Act of Parliament to plead the general issue that is not guilty by statute and when a defendant is allowed to do this he cannot plead any other defence except with leave but he can raise the defence of the statute under the general issue (c)

**379** In actions for the recovery of land which have now taken the place but retain many of the peculiarities of the old actions of ejectment (1) the plaintiff must on the face of his pleading show, and must at the trial prove a legal title to possession not barred by the statute (c) A statement of claim which does not on the face of

Actions for  
the recovery  
of land.

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Cro Car 404 *Chapple v Durston* (1830) 1 Cr & J 1 see now R S C Ord 19 r 15 Actions may in some cases be tried without pleadings (R S C Ord 18A In such cases the defence of the statute must be raised by notice (*ibid* r 5) In penal actions the defendant could formerly take advantage of the statute under a plea of the general issue see notes to *Hodsdon v Harridge* (1670) 2 Wms Saund (cd 18/1) 150 159 stat (1623) 21 Jac 1 c 4 s 4 *Spencer (Earl) v Suannell* (1638) 3 M & W 154 at p 161 Pullen and Leale Precedents of Pleading, 3rd ed 704 R S C Ord 19 r 12 Ord 21 r 19) but see the Public Authorities Protection Act 1893 (56 & 57 Vict c 61) s 2 As to the rules which relate to pleading under the present practice see R S C Ord 19 20 21 as to the forms of the plea of the statute see *ibid* Appendix D ss 2 4 as to notice of the defence of the statute in an action in the county court see County Court Act 1888 (51 & 52 Vict c 43) s 82 County Court Rules 1895 Ords 10 14 Appendix Form 95a *Faton v Tapley* [1899] 1 Q B 953 *Gregory v Torquay Corporation* [1911] 2 K B 556 title COUNTY COURTS Vol VIII p 485

(a) R S C Ord 19 r 15

(b) See p 184 *post*

(c) P S C Ord 19 r 15 Ord 21 r 19 The Public Authorities Protection Act 1893 (56 & 57 Vict c 61) abolishes the right to plead the general issue wherever conferred by any of the enactments specified in the schedule to that Act and also wherever conferred by any public general Act to which that Act applies (see p 176 *ante*) But it seems that in cases to which the Public Authorities Protection Act 1893 (56 & 57 Vict c 61) has no application (see p 176 *ante*) if a person is sued and a statute which is still in force allows him to plead the general issue he may still do so see *The Ydun* [1899] P 236 C A *per* JEUNE P at pp 240 *et seq* *A G v Margate Pier and Harbour (Company of Proprietors)* [1900] 1 Ch 749 *per* KEREWICH J at pp 754 755 *Lyles v Southend-on-Sea Corporation* [1905] 2 K B 1 C A *per* VAUGHAN WILLIAMS J at p 13 The Limitations of Actions and Costs Act 1842 (5 & 6 Vict c 97) (see p 177 *ante*) repeals all provisions in local and personal Acts passed before 10th August 1842 which enable a defendant to plead the general issue

(d) See *Gledhill v Hunter* (1880) 14 Ch D 492

(e) See the Real Property Limitation Act 1833 (3 & 4 Will 4 c 27) s 34 and pp 155 158 *ante*

**SECT 1** **Pleading the Statutes of Limitation** it show such a title may be struck out (f) The defendant need not plead the statute but may simply plead that he is in possession (g) On such a plea the plaintiff can only take issue and proceed to trial he cannot reply specially (h)

In actions in which the title to land incidentally comes in question, for example, in cases of trespass to land there is no reason for specially setting up the statute the proper mode of taking advantage of it being by a plea which denies that the land belongs to the party dispossessed (i) There may however be cases where in such actions the statute may with advantage be specially pleaded for instance if in an action for trespass there is a plea justifying under a grant the plaintiff may reply that the grant is more than twelve years old and that the defendant never went into possession under it and that therefore his title was extinguished before the trespass was committed (j)

**Pleas to a defence of set off or counterclaim**

**380** If the statute is pleaded to a defence of set off the plaintiff in order to establish his plea must prove at the trial that the set off was barred when the plaintiff commenced his action it is not enough to prove that the set off was barred at the time when it was pleaded (k) The case of a counterclaim it seems is different and it is enough for the plaintiff to prove that the counterclaim was barred when it was pleaded (l)

**When issue joined**

**381** When issue is joined on a plea of the statute the burden of proving that the cause of action arose within the statutory period lies on the plaintiff (m)

**Pleading disability**

**382** A traverse of the plea of the statute only puts in issue the time at which the cause of action accrued Therefore if the plaintiff relies upon the existence of any disability as taking the case out of the statute he must reply such disability specially (n) and the

(f) P S C Ord 21 r 4 *Dawkins v Penrhyn* (Lord) (1878) 4 App Cas 51 *Philipps v Philipps* (1878) 4 Q B D 127 C A *Darbyshire v Leigh* [1896] 1 Q B 504 C A

(g) R S C Ord 21 r 21 *Heath v Pugh* (1881) 6 Q B D 345 per LINDLEY J at p 353

(h) *Danford v McInty* (1883) 8 App Cas 406 *Muller v Kirwan* [1903] 2 I R 118 As to the onus of proof see *Colclough v Heydon* (1860) 1 L T 439 As to pleading in actions by the Crown see stat (1623) 21 Jac 1 c 14 *A G to the Prince of Wales v St Aubyn* (1811) Wight 167 266 *A G v Ward* (1832) Hayes 555 *A C v Parsons* (1836) 2 M & W 23 *A G for Trinidad and Tobago v Bourne* [1895] A C 83 P C

(i) *De Beauvoir v Owen* (1847) 16 M & W 547 As to trespass generally see title TRESPASS

(j) *Keyse v Powell* (1853) 2 E & B 132 see *Jones v Jones* (1847) 16 M & W 699 and p 157 ante A reply can now only be pleaded by leave of the court or a judge (P S C Ord 23 r 1) see title PLEADING

(k) *Waller v Clements* (1850) 15 Q B 1046 *Ord v Ruspini* (1797), 2 Esp 569 *Re Ballard Lovell v Forester* [1890] W N 64 As to pleading the statute to part of a claim of set off see *Mead v Bashford* (1850) 5 Exch 336 and generally see title SET OFF AND COUNTERCLAIM

(l) See R S C Ord 19 r 3 *McCowan v Middleton* (1883) 11 Q B D 464 C A

(m) *Walby v Henman* (1834) 2 Cr & M 658 *Beale v Nind* (1821), 4 B & Ald 568 571 *Hirst v Parker* (1817) 1 B & Ald 92

(n) No pleading subsequent to defence is now permitted except with

reply should aver the existence of the disability at the time of the accrual of the cause of action and also that the action was commenced within the proper period of the termination of the disability or while the disability was still subsisting. (o) If the plaintiff to a plea of the statute replies alleging a disability, a rejoinder is bad which does not deny that the action was commenced while the disability was still subsisting or within the statutory period of the cessation of the disability. A rejoinder to such a reply is bad if the rejoinder amounts to a denial of the plaintiff's cause of action. A plea of the statute admits the plaintiff's right to sue, but alleges that the remedy is barred by lapse of time. (p) Any matter that amounts to a denial of the plaintiff's right must be pleaded in the defence and cannot be taken advantage of in rejoinder. (q)

SECT 1  
Pleading the  
Statutes of  
Limitation

**383** In cases of simple contract debts the liability may be revived by a promise to pay and a promise to this effect is evidenced by an acknowledgment in writing or part payment. (r) Such a promise is not a waiver of the statute but a new cause of action and therefore if made within six years of action brought it may be proved on a joinder of issue on a defence of the statute. (s)

Pleading  
acknowledg-  
ment or part  
payment.

If in an action for a simple contract debt issue is joined on a defence of the statute a promise made within six years cannot be relied on to defeat the plea of the statute unless the parties to the promise are identical with those between whom the debt declared upon arose. Thus if the original cause of action is a debt due from two persons jointly and the promise relied on is a promise by

the leave of the court or a judge (R S C Ord 23 r 1) see title PLEADING

(o) 1 Chitty's Pleas, 3rd ed. 475 Bullen and Leake Precedents of Pleading 3rd ed. 645

(p) See *Margetts v Bays* (1836) 4 Ad. & El. 459

(q) *Scarpellum v Atcheon* (1845) 7 Q. B. 864

(r) See pp. 58, 67 *ante*

(s) An acknowledgment or part payment is often pleaded by way of reply to a defence of the Limitation Act 1623 (21 Jac. 1 c. 16) where the parties are the same see *Sleet v Lindsay* (1877) 2 Ex. D. 314 *Re Fountaine Re Dowler Fountaine v Amherst (Ind)* [1909] 2 Ch. 382 384 C.A. (amendment allowed at time) R S C Ord 19 r 15 Yearly Practice of the Supreme Court 1912 Vol. I 245 Bullen and Leake Precedents of Pleading 6th ed. 728 Odgers Principles of Pleading and Practice 6th ed. 247 Before the Judicature Act 1873 (36 & 37 Vict. c. 66) it never was the practice in an action under the Limitation Act 1623 (21 Jac. 1 c. 16) to plead such an acknowledgment or part payment by way of reply to a defence of the statute nor was it necessary to plead such an acknowledgment specially in the declaration (*Upton v Elise* (1827) 12 Moore (C.P.) 303 see *Ridd v Moggridge* (1857) 2 H. & N. 567 *Tanner v Smart* (1827) 6 B. & C. 603) As to pleading a conditional promise see *Haydon v Williams* (1830) 7 Bing. 163 *Hopkins v Logan* (1839) 5 M. & W. 241 248 *Hunter v Hunter* (1869) 31 P. C. L. 138 As to actions on bills of exchange etc. see *Tanner v Smart supra* Chitty on Bills of Exchange 3rd ed. Part II 279 2 Chitty's Pleading 4th ed. 144 338 Now however the best course would seem to be to set out such an acknowledgment or part payment in the statement of claim see R S C Ord 19 r 4 As to allegations in the statement of claim that there has been an acknowledgment or part payment, see *Hollis v Palmer* (1836) 2 Bing. (N.C.) 713

**SMOT 1**  
**Pleading the**  
**Statutes of**  
**Limitation**

Pleading in  
 representa-  
 tive character

Actions on  
 specialties

Promise not  
 to plead the  
 statute

one to pay his proportion this must be declared on specially and cannot be used in an action against both to defeat a defence of the statute pleaded by the one who made the new promise (f)

In an action by an executor or administrator if the plaintiff relies on an acknowledgment or part payment made to him as the personal representative of the deceased the statement of claim should allege that the promise was made to the plaintiff in his representative capacity (u) If the plaintiff relies on a promise made by the defendant in his representative capacity he must allege such a promise as the cause of action (u)

In actions on specialties governed by the Civil Procedure Act, 1833 (a) an acknowledgment or part payment should either be alleged in the statement of claim or pleaded in reply to a defence of the statute and should state whether the acknowledgment relied on is by writing signed by the defendant or writings signed by his agent, or by part payment (b) The acknowledgment need not be set out (c) A plea to an action on a specialty should state not only that the debt had become payable more than twenty years before and that no acknowledgment had been given nor part payment made but also that there had been no payment of interest (d)

**384** A promise not to plead the Limitation Act 1623 (e) whether in writing or not if it is founded on good consideration

(t) *Lechmere v Fletcher* (1833) 1 Cr & M 623 626 n *Pittam v Foster* (1823) 1 B & C 248 (this case where one party was a married woman was before the Married Women's Property Act 1882 (45 & 46 Vict c 75) but the law since that Act seems the same (*Beal v Pierce* (1889) 23 Q B D 316 C A)

(u) *Haelman v Waller* (1737) Willes 27 *Dean v Crane* (1704) 1 Salk 28 S C sub nom *Green v Crane* (1705) 11 Mod Rep 37 *Mailboroughs (Dule) Executors v Wadmore* (1731) 2 Stra 890 *Sarell v Wine* (1805) 3 East 409 *Ward v Hunter* (1815) 6 Taunt 210 *Short v McCarthy* (1820) 3 B & Ald 626 631 *Bodger v Arch* (1804) 10 Exch 333 *Tanner v Smart* (1827) 6 B & C 603 There is one decision to the contrary effect *Williams v Cun* (1701) Fortes Pep 177 (see *Heylyn v Hastings* (1698) Carth 470) but it cannot be considered as law As to the proper defence to such an allegation see R S C Appendix D s 5 *Rolleston v Dixon* (1845) 2 Dow & L 892 *Browning v Paris* (1839) 5 M & W 117 120 The statements to the contrary in *Timmis v Platt* (1837) 2 M & W 720 (also reported sub nom *Gilbert v Platt* 5 Dowl 748) are inconsistent with general principles and opposed to the weight of authority

(a) 3 & 4 Will 4 c 42

(b) *Kempe v Gibbon* (1846) 9 Q B 609 *Forsyth v Bristowe* (1853) 8 Exch 347 In an application for the revivor of a judgment which is more than twelve years old the affidavit in support should show that there has been an acknowledgment or payment within twelve years (*Loveless v Richardson* (1856) 2 Jur (N S) 716) or that the judgment debt only became payable within twelve years see *Kennedy v Whaley* (1848) 12 I L R 54 As to the old practice as to revivor of judgments see *Farran v Beresford* (1843) 10 Cl & Fin 319 H L *Conlan v Bodkin* (1845) 7 I L R 467 *Kennedy v Whaley supra* As to the modern practice relating to revivor of judgments, see R S C, Ord 42 rr 22 23

(c) *Kempe v Gibbon* (1846) 12 Q B 662

(d) *Molony v O'Brien* (1842) 5 I L R 577

(e) 21 Jac 1, s 16

which has been subsequently performed, may, it seems, be a good reply to a defence of the statute (*f*)

**385** If there are several persons originally liable on a contract and one or more of such persons can take advantage of one of the Statutes of Limitation and the others cannot those persons to whom the defence of the statute is not open may it seems, be sued without joining the others (*g*)

**386** Since the Judicature Act 1873 (*h*), in all actions founded on fraud which before that Act could be brought either in a court of common law or in a court of equity or in a court of equity alone if the statute is pleaded a reply that the fraud was actively and deliberately concealed by the defendant's act until within six years of action would be a good reply (*i*) But a reply that the fraud was not discovered till within six years of action would now be a good reply only in actions which before the Judicature Act 1873 (*h*) could have been brought in a court of equity alone In a pure common law action (*g*) an action for negligence which before the Judicature Act 1873 (*h*) could not have been brought in a court of equity at all a reply of fraudulent concealment of the cause of action is it seems even now bad unless it alleges that the concealment was the fraudulent act of the defendant (*l*) If a plaintiff wishes to rely on an allegation of concealed fraud in order to bring himself within the Real Property Limitation Act 1833 (*l*) s 26 he must in his statement of claim fully allege facts which reasonably lead to the inference that the fraud was the cause of his being deprived of the land which he claims (*m*)

**387** If a defendant to whom a defence of the statute is open omits through inadvertence to plead it the court if of opinion that the plea of the statute is in the circumstances a meritorious one will allow an amendment of the pleadings so that the defendant may avail himself of the defence (*n*)

SECT 1  
Pleading the  
Statutes of  
Limitation

Suing some  
only of per-  
sons liable

Fraud

Omission to  
plead  
statute

Amendment

## SECT 2 — *Process to Prevent the Statutory Bar*

### SUB SECT 1 — *In General*

**388** The Statutes of Limitation prohibit the bringing of an action on the lapse of certain periods after the right of action has accrued For the purposes of the statutes an action is brought when a writ or originating summons is issued (*o*) If a writ is issued within the required time and not properly continued, and a

What is  
commence-  
ment of  
action

(*f*) *Lade v Trull 1 ill v Lade* (1842) 6 Jur 272 see p 65 *ante*

(*g*) See R S C Ord 16 r 11 and Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 2 (repealed by the Statute Law Revision Act 1890 (53 & 54 Vict c 33) but see *ibid* s 3)

(*h*) 36 & 37 Vict c 66

(*i*) *Gibbs v Guild* (1882) 9 Q B D 59 C A

(*k*) *Armstrong v Milburn* (1885) 54 L T 247 723 *Barber v Houston* (1885) 18 L R Ir 475 C A

(*l*) 3 & 4 Will 4 c 27 see p 143 *ante*

(*m*) *Laurance v Norreys* (1890) 15 App Cas 210

(*n*) *Bone v Smith* (1868) 21 R C L 244 *Archbold v Houth (Earl)* (1864) 15 I C L R 420 As to the amendment of writ, see pp 188 189,

*post*

(*o*) See title PRACTICE AND PROCEDURE

**SECT 2**  
**Process to**  
**Prevent the**  
**Statutory**  
**Bar**

Renewal of  
writs

fresh writ is afterwards issued on which the plaintiff proceeds, the commencement of the action is the issuing of the last writ, and if this is out of time the plaintiff is barred (p)

**389** An original writ of summons is in force for and except when a solicitor agrees to accept service must be served within twelve months from the day of the date thereof including the day of such date, but if any defendant therein named is not served with the writ, the court upon the application of the plaintiff before the expiration of the twelve months may order that the writ be renewed for six months and so from time to time during the currency of the renewed writ. A writ so renewed is available to prevent the operation of any Statute of Limitation from the date of the issuing of the original writ (a)

When renewal  
refused

If by any mistake of the plaintiff or his solicitor a writ has not been renewed within the proper time the court will not except in very special circumstances allow the writ to be afterwards renewed in order to save the case from the bar of the statute (b). Nor will the court allow a renewal when an attempt has been made to get the writ renewed before the lapse of the prescribed period and has failed only because the office was closed for the vacation, if there is no default on the part of any public officer (c)

Loss of writ

The court may where the original writ is lost order its officer to seal a verified copy of the writ as if it were the original (d)

Service out of  
jurisdiction

If a writ of summons for service within the jurisdiction has been issued but not served and has been renewed from time to time, and is still in force the court will enlarge the time for applying for a concurrent writ of summons for service out of the jurisdiction (e)

What  
amendments  
will be  
refused

**390** A writ will not except in very special circumstances be amended by dating it before the day on which it was actually issued although it was by a mistake that the writ was not issued before (f) and a plaintiff will not be allowed

(p) *Pratt v Hawkins* (1846) 15 M & W 399

(a) R S C Ord 8 r 1. This rule applies to writs issued before as well as after the Judicature Act 1875 (38 & 39 Vict c 77) (*Hume v Somerton* (1890) 25 Q B D 239). It seems that if there are several defendants in an action some of whom might have been served although others could not the renewal of the writ would prevent the statute operating in favour of any of the defendants (*Dickson v Capes* (1860) 11 I C L R 334 decided under the Common Law Procedure Amendment (Ireland) Act 1853 (16 & 17 Vict c 113) s 28). As to an agreement by a solicitor to accept service see *Re Kerly Son and Verden* [1901] 1 Ch 467 C A and see generally title PRACTICE AND PROCEDURE.

(b) *Laar v Wade* (1861) 1 B & S 728. *Barley v Owen* (1860) 9 W R 128. *Doyle v Kaufman* (1877) 3 Q B D 7340 C A. *Hewett v Barr* [1891] 1 Q B 98 C A. *Magee v Hastings* (1891) 28 L R Ir 288 see *Smalpage v Tonge* (1886) 17 Q B D 644 C A.

(c) *Evans v Jones* (1862) 2 B & S 45. *Anon* (1862) 31 L J (Q B) 61 see *Anon* (1854) 24 L J (Q B) 23. *Markey v Dowdell* (1852) 2 I C L R 117.

(d) R S C Ord 8 r 3 which meets the case of *Davies v Garland* (1876) 1 Q B D 250.

(e) See R S C Ord 6. *Smalpage v Tonge supra* and see generally title PRACTICE AND PROCEDURE.

(f) *Clarke v Smith* (1858) 2 H & N 753. *Campbell v Smart* (1847) 5 C B 196.

to amend his pleadings so as to introduce a cause of action which is barred by the statute at the time of the attempted amendment (g) The assignee of a chose in action who has not given to the debtor notice of the assignment (h) and has brought an action against the debtor in his own name will not be allowed to amend his writ by adding the assignor as a plaintiff when the statutory period has elapsed between the issue of the writ and the time of the attempted amendment (i) It is doubtful whether a writ will be amended by the alteration of the names of the parties when the effect of the amendment is to save the operation of the statute (j) If a writ has been amended the original writ not the amendment, is the commencement of the action (l)

SMUT 2  
Process to  
Prevent the  
Statutory  
Bar

Under the Common Law Procedure Act 1852 (l), a plaintiff before service of a writ might without an order of the court correct a mistake in the name of a defendant or the number of the defendants whom he had sued the writ being resealed but the original date remaining unaltered (m) The plaintiff can now by leave of a master before service make any alteration in a writ (n) except that he cannot alter the day of the issue of the writ (m)

Amendments  
without leave

The issue of a writ in one action before the expiration of the statutory period only keeps alive the cause of action in the action in which it was issued and if another action for the same cause is commenced after the expiration of the statutory period the second action will be barred (o)

Effect of one  
action on  
another

A report by a master establishing a debt in one action is not an acknowledgment which will take the case out of the statute if it be set up as a defence to any independent action by the creditor (p) Neither the pendency of any action in which the claim of any person whether a party or not might be or has been decided nor any order or proceeding in such action can in any circumstances affect the operation of the statute on the claim of such person in an independent action instituted by him to enforce his claim (q)

(g) *Weldon v Neal* (1887) 19 Q B D 394 C A *Lancaster v Moss* (1899) 15 F L R 476 C A see *Steward v North Metropolitan Tramways Co* (1886) 16 Q B D 506 C A

(h) See Judicature Act 1873 (36 & 37 Vict c 66) s 25 (6) and title CHUSES IN ACTION Vol IV p 372

(i) *Hudson v Fernyhough* (1889) 61 L T 722 affirmed (1890) 34 Sol Jo 228 C A see *A G v Pontypidd Waterworks Co* [1908] 1 Ch 388 *Byron v Cooper* (1844) 11 Cl & Fin 556 H L *Flouden v Thorpe* (1840) 7 Cl & Fin 137 H L

(j) See *Crawford v Cocks* (1851) 20 L J (EX) 169 *Ohallnor v Roder* (1885) 1 F L R 527 *Re Jones Cox v Fye* (1877) 46 L J (CH) 316

(k) *Coombs v Bristol and Exeter Rail Co* (1858) 1 F & F 206 *Ryan v Sheehy* (1847) 12 I L R 44

(l) 15 & 16 Vict c 76

(m) *Clarke v Smith* (1858) 2 H & N 753 As to the practice before the Judicature Act 1873 (36 & 37 Vict c 66) see *Gibson v Varley* (1856), 26 L J (Q B) 79

(n) See Practice Masters Rules (13)

(o) See *Manby v Manby* (1876) 3 Ch D 101

(p) See p 93 ante

(q) See *Manby v Manby* *supra* but see *Barrett v Birmingham* (1842) 4 I Eq R 537, 548 *Greenway v Bromfield Handley v Wood* (1851) 9 Hare 201



## SECT. 2.

SUB SECT. 2—*Proceedings by One Party as affecting Others***Process to Prevent the Statutory Bar**

Proceeding on behalf of plaintiff and others

Administration proceedings

Action must be one for the recovery of demand sought to be saved from bar

**391** If an action is brought by a plaintiff on behalf of himself and other persons, the bringing of the action enures to the benefit of the other persons who know of and consent to it but not it seems to the benefit of other persons who know nothing of it (r) and there are some proceedings which enure for the benefit of persons other than those who commenced them (s)

**392** If administration proceedings under the present practice are commenced by an executor who is also a creditor of the testator, and a claim is brought in by a creditor for a simple contract debt, which was more than six years old at the time of the judgment but not at the time of the commencement of the action the claim is barred by the statute (t). An ordinary administration judgment operates as a judgment in favour of creditors and prevents time running against them (u) and an administration judgment or order operates from its date not merely in favour of a creditor but in favour also of the right of set off against a creditor's demand (a)

**393** An action by whomsoever commenced must to save the operation of the statute be in its nature one for the recovery of the demand sought to be saved from the bar of the statute (b). There fore if in a foreclosure action an inquiry is directed as to incumbrances no incumbrancer coming in under the judgment can affect any benefit from the commencement of the action so far as the statute is concerned (c). If an incumbrancer is made a defendant, it is doubtful whether he can avail himself of the commencement of

(r) *Sterndale v Hanlson* (1827) 1 Sim 393. See *Lerrington v Pians* (1835) 1 L & C (n) 434. *Linn v Lynch* (1841) 4 L Q R 316. *Pitman v Williams* (1844) 3 H L 317. *Watson v Buch* (1847) 15 Sim 523. *O Kelly v Godlin* (1840) 2 L Q R 361. (1841) 3 L Q R 390. *Huchins v O Sullivan* (1841) 11 L Q R 443. *Carroll v Darcy* (1847) 10 L Q R 521. *Birmingham v Luile* (1845) 2 Jo & Lat 699 714. *Bennett v Bernard* (1848) 12 L Q R 229 234. *Thompson v Hurly* [1905] 1 L R 588.

(s) See *Archdall v Anderson* (1890) 25 L R Ir 433 (legatees obtaining the benefit of an action brought by a mortgagee to raise the sum due on an equitable mortgage when a sale under the judgment in the action realised more than sufficient to pay the plaintiff's demand). *Murphy v Sterne* (1838) 1 Dr & Wal 236. As to proceedings in Ireland in the Incumbered Estates Court see *Re Colclough* (1855) 8 L Ch R 330. C A. *Re Nixon's Estate* (1814) 9 L R Eq 7 C A. *Re Glover* (1857) 6 L Ch R 587 in the Incumbered Estates Court see *Irish Land Commission v Davies* (1891) 27 L R Ir 334. *Pe Gibbs Estate* (1893) 31 L R Ir 95. *Re Wades Estate* (1884) 13 L R Ir 515. *Re Taaffe's Estate* (1878) 1 L R Ir 387. *Re Stinson's Estate* (1892) 29 L R Ir 490 in the Land Commission *Re Bateson's Estate* [1895] 2 L R 559. *Re Smithwick's Estate* [1896] 2 L R 401. *Re Swanton Estate* [1896] 1 L R 157. *Re Morrison's Estate* [1907] 1 L R 15 C A.

(t) *Re Greaves Deceased Bray v Fosfield* (1881) 18 Ch D 551 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 340.

(u) *Finch v Finch* (1876) 45 L J (Ch) 816 see *Harrison v Kirk* [1904] A C 15. As to an administration action by residuary legatees see *Prowse v Spurgin* (1868) L R 5 Eq 99 and see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 278 341.

(a) *Re Ballard Lovell v Forester* [1890] W N 64.

(b) See *Thompson v Hurly* [1905] 1 L R 588.

(c) *Bennett v Bernard* (1848) 12 L Q R 229.

the proceedings against him so as to save the operation of the statute on his claim the better course for him on his being made defendant would it seems be to counterclaim for an order for payment of his incumbrance (*d*)

**SECT 2**  
**Process to**  
**Prevent the**  
**Statutory**  
**Bar**

Effect of  
appointment  
of receiver

**394** The appointment of a receiver does not save the rights of any persons but the parties to the action in which the receiver was appointed (*e*) Where money is paid into court by a receiver appointed in an action the money until appropriated to some particular demand is held *in usum jus habentium* and from the time of payment in the statute does not run against the right of a person entitled (*f*)

**395** Proceedings in bankruptcy or for the winding up of a company are for the benefit of all creditors and prevent the statute from running in favour of the person or company indebted (*g*) It as a condition of rescinding a receiving order money is paid into court to provide for all debts in full such debts are not barred by the statute although payment is not claimed within six years of the rescinding of the order (*h*) Proceedings in bankruptcy and winding up have with reference to the statute, no effect as regards debts due to the bankrupt or company (*i*)

Bankruptcy  
and winding  
up

**396** Provision is made for the carrying on of an action by or against the proper persons in the event of a change after the commencement of the action in the parties in whom the cause of action is vested or against whom the action is brought (*j*) These rules have not interfered with the equitable construction of the Limitation

Change of  
parties

(*d*) *Watson v Birch* (1847) 15 Sim 523 Sugden on the Statutes relating to Real Property 2nd ed 124 *Humble v Humble* (1857) 24 Beav 5

(*e*) See p 190 *ante* and title RECEIVERS

(*f*) *Houlin v Sheppard* (1870) 6 I R 1 q 38 *Le Vugent's Trusts* (1855) 19 L R Ir 140 *Re Pelton's Estate* [1894] 1 I R 537 see *Lancaster v Tiers* (1846) 10 Beav 164 *McLellan v Varasour* (1893) 9 I R 376 *Lallara v Milner* [1895] W N 14 *Re Dennis Ex parte Dennis* [1895] 2 Q B 630 *Harrison v Hall* [1904] A C 15 Compare the effect of paying money into court under the Lands Clauses Consolidation Act 1845 (8 & 9 Vict c 18) see p 156 *ante* and title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 116 *Re Stead's Mortgaged Estates* (1876) 2 Ch D 713 *Re Bluelock Commissioners Ex parte Forde* [1894] 1 I R 156

(*g*) See titles BANKRUPTCY AND INSOLVENCY Vol II p 202 COMPANIES Vol V p 509 compare pp 92 93 *ante* As to proceedings in lunacy see p 171 *ante*

(*h*) *Re Dennis Ex parte Dennis* [1895] 2 Q B 630 and see title BANKRUPTCY AND INSOLVENCY Vol II, p 91

(*i*) As to motions in bankruptcy see title BANKRUPTCY AND INSOLVENCY Vol II p 315

(*k*) R S C Ord 18 rr 2—10 see title PRACTICE AND PROCEDURE As to bills of review and supplement in Chancery before the Judicature Act 1873 (36 & 37 Vict c 66) see Mitford Pleadings in Chancery 272 *Hollingshead's Cause* (1721) 1 P Wms 742 *Hercy v Dunwoody* (1793) 4 Bro C C 257 *Hovenden v Annesley (Lord)* (1806) 2 Sch & Lef 607, 632—639 *Egremont (Earl) v Hamilton* (1811) 1 Ball & B 516 531 *Haggins v Shaw* (1842) 2 Dr & War 356 *Alsop v Bell* (1857) 24 Beav 451 *Patch v Holland* (1873) 29 L T 419 *Dunne v Doyle* (1860) 10 I Ch R 502 *Ongie v Truelock* (1873) 2 Mol 31 38

**SECT 2**  
**Process to**  
**Prevent the**  
**Statutory**  
**Bar**

Act 1628 (l) s 4 or of the Civil Procedure Act 1833 (m) s 6, but have only supplied an additional remedy (n) An order will not be made for the purpose of reviving the remedy on a judgment which has been barred by the Real Property Limitation Act, 1874 (o), s 8 But where the court holds money that has been paid in to the credit of a suit lapse of time however long is no ground for refusing an order for revival (p), and where owing to lapse of time it is impossible to trace the representatives of original defendants and there is a fund in court revival may be dispensed with and the fund paid out (q)

**Action in the**  
**nature of a**  
**bill of review**

It seems that even since the Judicature Acts the Chancery Division of the High Court of Justice can grant leave to bring an action in the nature of a bill of review (r) to reopen a case that has already been decided where the judgment has been obtained by fraud or where since the judgment fresh material evidence has been obtained which could not previously have been procured (s) Leave may be refused if application were made more than twelve years from the date of the judgment (t)

(l) 21 Jac 1 c 16 see p 55 ante

(m) 3 & 4 Will 4 c 42 see p 78 ante

(n) *Swindell v Bullcley* (1886) 18 Q B D 250 C A see *Armson v Smith* (1889) 40 Ch D 567 C A

(o) 37 & 38 Vict c 57 *Jay v Johnstone* [1893] 1 Q B 25 189 C A  
*Diana v O'Donnell* (1886) 18 L R Ir 170 C A

(p) In *Micklethwaite v Vavasour* (1893) 9 T L R 376 CHITTY J granted an order of revival after the lapse of 150 years the applicant seeking the order for the purpose of getting at funds which were in court but the order was limited to the funds in court

(q) *Ballard v Milner* [1895] W N 14 and see title BANKRUPTCY AND INSOLVENCY Vol II p 91

(r) As to bills of review in Chancery before the Judicature Acts see *Smith v Clay* (1767) 3 Bro C C 639 n

(s) *Bright (Charles) & Co v Sellar* [1904] 1 K B 6 C A *Sturrock v Littlejohn* (1898) 68 L J (Q B) 165 *Birch v Birch* [1902] P 130 *Boswell v Coals* (1894) 6 R 167 *Falcke v Scottish Imperial Insurance Co* (1887) 57 L J 39 *Re Scott and Alvarez's Contract* *Scott v Alvarez* [1895] 1 Ch 596 622 C A compare *Re St Lawrence Co* (1879) 12 Ch D 88 C A see title LSROPPEL Vol XIII pp 333 334

(t) See Real Property Limitation Act 1874 (37 & 38 Vict c 57) s 8 Before the Judicature Acts bills of review were barred in twenty years from the date of the decree and five years after the removal of the disability of the plaintiff in error if any this rule was adopted by analogy to the limitation prescribed for writs of error by stat (1698) 10 Will 3 c 20 (*Kelly v Lennon* (1844) 1 Jo & Lat 305)

## LIMITATION OF LIABILITY

*See* ADMIRALTY SHIPING AND NAVIGATION

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## LIQUIDATED DAMAGES

*See* BUILDING CONTRACTS ENGINEERS, AND ARCHITECTS, DAMAGES

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## LIQUIDATION

*See* COMPANIES PARTNERSHIP

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## LIS PENDENS

*See* JUDGMENTS AND ORDERS, SALE OF LAND

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# LITERARY AND SCIENTIFIC INSTITUTIONS

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## Part I — Nature and Constitution

**Introductory**      **397** A considerable number of the learned societies in this country are incorporated by Royal Charter the oldest of them the Royal Society of London having been thus incorporated by Charles II in 1662. Others have taken advantage of the provisions of the Companies Act 1867 (*a*). The majority of the literary and scientific institutions however are not incorporated.

**Charitable institutions**      **398** Institutions such as the Royal Society of London which was founded for the purpose of improving natural knowledge and the Royal Geographical Society the object of which is the improvement and diffusion of geographical knowledge are charitable institutions and gifts to them for their general purposes are charitable (*b*).

**Operation of the Literary and Scientific Institutions Act 1854**      **399** The increasing number of literary and scientific institutions and the importance of their work led to the passing of the Literary and Scientific Institutions Act 1854 (*c*) (referred to in this title where the context permits as 'the Act') which applies to all institutions whether incorporated or not for the time being (*d*) established for the promotion of science (*e*) literature the fine arts for adult instruction the diffusion of useful knowledge the foundation or maintenance of libraries (*f*) reading rooms

(*a*) 30 & 31 Vict c 131 s 23 (repealed and re-enacted by the Companies (Consolidation) Act 1908 (8 Edw 7 c 69) s 20). See title COMPANIES Vol V pp 1118 note (*i*). As to the power conferred upon the Charity Commissioners by the Charitable Trustees Incorporation Act 1852 (35 & 36 Vict c 24) to incorporate the trustees of any charity for religious educational literary scientific or public charitable purposes see title CHARITIES Vol IV pp 283 285 314.

(*i*) See title CHARITIES Vol IV p 111. As to the jurisdiction of the Charity Commissioners over estates purchased with money arising from the voluntary contributions of members of a society see *Royal Society of London and Thomson* (1881) 17 Ch D 407 and title CHARITIES Vol IV pp 305—308.

(*c*) 17 & 18 Vict c 112 (referred to in this title as 'the Act').

(*d*) If existing at the time of the passing of the Act or in the future (*Re Russell Institution Higgins v Baghino* [1898] 2 Ch 72).

(*e*) As to the meaning of science see *Inland Revenue Commissioners v Forrester* (1890) 15 App Cas 334 *Weir v Crum Brown* [1908] A C 162 168.

(*f*) See further as to libraries Public Libraries Acts 1892—1901 (50 & 56 Vict c 53 56 & 57 Vict c 11 1 Ldw 7 c 19) pp 201 note (*e*) 201 post title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

for general use among the members or open to the public of public museums and galleries of paintings and other works of art collections of natural history mechanical and philosophical inventions instruments or designs (*g*)

The Act (*h*) is not confined to institutions of a public or charitable nature (*i*) but it extends also to private institutions established for the purposes of the Act (*j*)

The Act (*n*) does not apply to the Royal Institution or the London Institution for the Advancement of Literature and the Diffusion of Useful Knowledge (*l*) Nor does it authorise the establishment of institutions for recreation or enjoyment as distinguished from instruction (*l*)

**400** A society established for the promotion of literature science and the fine arts may be incorporated as a friendly society (*m*)

PART I  
Nature and  
Constitu-  
tion

Institutions  
not within  
the Act

Incorporation  
as a friendly  
society

## Part II—Property

### SECT. 1—Land

#### SUB SECT. 1—Conveyance of Site

**401** Freehold or copyhold land not exceeding an acre with or without buildings may be assured by way of gift sale or exchange in fee simple or for a term of years as a site for a literary or scientific institution but a grant by a tenant for life of such land is not valid without the concurrence of the person (if any and if legally competent) next entitled in remainder in fee simple or fee tail (*n*)

Where any portion of waste or commonable land is gratuitously conveyed as a site by a lord of the manor the rights of commoners (*o*) are barred (*p*) if the grant is (1) specially authorised by Act of Parliament or (2) made to or by any Government department or

Assurance of  
land not  
exceeding an  
acre  
Grant by  
tenant for  
life

Conveyance  
of waste lands  
by lord of  
manor

(*g*) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 33

(*h*) Literary and Scientific Institution Act 1854 (17 & 18 Vict c 112)

(*i*) Compare title CHARITIES Vol IV p 170

(*j*) *Re Russell Institution* *Friggins v Baghano* [1898] 2 Ch 42 repeated more fully *sub nom* *Re Russell Literary and Scientific Institution* *Friggins v Baghano* 61 F J (CH) 411

(*l*) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 33

(*l*) *Re Badger Mansell v Cobham (Viscount)* [1900] 1 Ch 365 (e.g. playing of cards billiards etc.)

(*m*) Friendly Societies Act 1896 (59 & 60 Vict c 20) s 8 (*o*) re-enacting Friendly Societies Act 1815 (28 & 29 Vict c 60) s 8 (*o*) Treasury Special Authority 5th July 1878 See title FRIENDLY SOCIETIES Vol XV p 17, note (*l*)

(*n*) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 1 Compare the Places of Worship Sites Act 1873 (36 & 37 Vict c 50) s 1 and see title ECCLESIASTICAL LAW Vol XI p 72. As to grants of land in the Duchies of Cornwall and Lancaster to literary and scientific institutions see title CONSTITUTIONAL LAW Vol VII pp 222-226

(*o*) As to the rights of commoners see title COMMONS AND RIGHTS OF COMMON Vol IV pp 499 *et seq*

(*p*) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 1



|  |  |
|--|--|
| <b>SECT 1</b><br><b>Land</b>                   | (3) made with the consent of the Board of Agriculture and Fisheries (q)  |
| <b>Sites granted for separate institutions</b> | Any number of sites exceeding in the aggregate one acre in extent may be granted for distinct and separate institutions, so long as no institution gets a site exceeding one acre (r)  |
| <b>Where conveyance made to trustees</b>       | <b>402</b> Where an institution is not a corporation the grant of any land under the Act (s) or otherwise may be made to trustees for the purpose of the institution. The trustees may be individuals or corporate bodies sole or aggregate (s)  |
| <b>Copyholds</b>                               | A conveyance of copyholds or lands of customary tenure for the purpose of an institution by any deed in which the copyholder and the lord respectively grant and convey their interests vests the freehold interest in the grantee without any surrender or admittance or enrolment in the lord's court. But any fees payable by the custom of the manor upon such enrolment must be paid to the steward (t) |
| <b>Form of conveyance</b>                      | Assurances of sites under the Act (u) should follow the statutory form given therein as closely as circumstances allow (u)   |
| <b>Death of donor within twelve months</b>     | <b>403</b> The death of the donor within twelve months of the execution of the deed of gift does not invalidate a grant under the Act (v)  |
| <b>Equitable owners</b>                        | <b>404</b> An equitable owner may convey land for the purposes of the Act (u) without the trustee or trustees in whom the legal estate is vested being parties to the conveyance (u)   |
| <b>Infants and lunatics</b>                    | In the case of a purchase of land belonging to an infant or a lunatic the guardian or curator of the infant (r) or the committee of the lunatic (a) may convey the property and receive and give valid discharges for the purchase money. The purchaser is under no obligation to see to the application of the purchase money (b)   |

SUB SECT 2—*Conveyance by Particular Persons*

(j) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 1 Commons Act 1899 (62 & 63 Vict c 30) s 22 (1) Sched I title COMMONS AND RIGHTS OF COMMON Vol IV p 510

(r) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 10 For form of grant of a site for a literary institution see Encyclopædia of Forms and Precedents Vol III p 431

(s) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 11 The provisions of the Trustee Appointment Act 1900 (13 & 14 Vict c 28) (Sir Morton Peto's Act) apply in the case of non corporate trustees (Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 12) See titles CHARITIES Vol IV p 262 TRUSTS AND TRUSTEES

(t) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 15 As to such fees see title COPYHOLDS Vol VIII p f

(u) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 13

(v) *Ibid* s 14 Compare Mortmain and Charitable Uses Act 1888 (51 & 52 Vict c 42) s 4 (i) As to the effect of Part II of the latter statute upon assurances in favour of literary or scientific institutions see title CHARITIES Vol IV p 140

(w) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 5 Presumably such a conveyance vests the legal estate in the grantee though the section does not expressly say so As to conveyance of land generally, see title SALE OF LAND

(x) As to the guardianship of infants see title INFANTS AND CHILDREN, Vol XVII pp 121 *et seq*

(a) As to the powers of a committee of a lunatic see title LUNATICS AND PERSONS OF UNSOUND MIND pp 432 *et seq post*

(b) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 5

Any corporation ecclesiastical or lay sole or aggregate, and any officers justices of the peace trustees or commissioners, holding land for public ecclesiastical parochial, charitable or other purposes or objects may subject to certain conditions grant (c) convey or enfranchise for the purpose of the Act (d) sites not exceeding one acre each in extent (d). The conditions are as follows — (1) no ecclesiastical corporation sole below the dignity of a bishop may make such a grant without the written consent of the bishop of the diocese (e) (2) a grant of parochial property in a rural parish requires the consent of the parish meeting and of the poor law guardians (f), (3) a grant of property held upon a charitable trust requires the consent of the Charity Commissioners or Board of Education as the case may be (g)

SECT 1  
Land

Corporations,  
officers and  
trustees

Grants by officers trustees or commissioners other than parochial trustees are valid if a majority or quorum authorised to act assembled at a meeting duly convened assent to the grant and execute the deed of conveyance although they may not constitute a majority of the actual body (h)

Conveyance  
by majority

Justices of the peace may give their consent to a grant of land or premises belonging to a county riding or division by vote at quarter sessions (i)

Consent by  
Justices

#### SUB SECT 3 — *Effect of Conveyance*

**405** Where a portion only of freehold land, subject to a perpetual rent or of leasehold land is being conveyed for the purposes of the Act (k) the rent and any renewal fines are apportionable as between the portion conveyed and the remainder of the land (l). The apportionment may be settled by agreement between — (1) the person for the time being entitled to the rent where the land is freehold or the lessor or other owner subject to the lease of the lands comprised in the lease (2) the person entitled to the fee subject to the rent or the lessee or other party entitled to the land under the lease or any assignment for the residue of the term and (3) the party to whom the conveyance is being made (l). An apportionment so made is binding on all underlessees and others whether parties to the agreement or not (k)

Lands subject  
to rent  
Apportion-  
ment

Apportionment followed by execution of the conveyance renders the person entitled to the fee or other estate in the lands subject to the rent the lessee and the persons entitled under him liable as

Effect of  
apportion-  
ment and  
conveyance

(c) *Quare* whether the word grant includes a grant by way of sale In the Literary and Scientific Institutions Act 1851 (14 & 15 Vict c 112) s 1 the words by way of sale

(d) *Ibid* s 6

(e) *Ibid*

(f) *Ibid* Local Government Act 1891 (56 & 57 Vict c 33) s 52 (1) see Poor Law Act 1889 (52 & 53 Vict c 36) s 8

(g) Literary and Scientific Institutions Act 1851 (17 & 18 Vict c 112) s 6, Board of Education Act 1899 (62 & 63 Vict c 33) and the Order in Council, 1902 made thereunder (Stat R & O Rev Vol IV Education England p 6)

(l) Literary and Scientific Institutions Act, 1851 (17 & 18 Vict c 112) s 7

(i) *Ibid*

(k) *Ibid* s 8

**SECT 1**  
**Land**

regards future accruing rents and renewal fines only in respect of the lands not included in the conveyance (l) Similarly the parties entitled have the same rights and remedies for the recovery of their apportioned rents as they previously had for the entire rents Except as to the amount of rent and renewal fines the covenants conditions and agreements remain in force with respect to the lands not included in the conveyance (l)

**SUB SECT 4—Application of Purchase money**

**Sale by  
ecclesiastical  
corporation  
sole**

**406** If the purchase money of land sold by an ecclesiastical corporation sole for the purposes of the Act (m) does not exceed £20 the party conveying may retain the money for his own benefit If it exceeds £20 the money is applicable for the benefit of the corporation sole as the bishop of the diocese directs by writing registered in the diocesan registry The purchaser is not concerned with the proper application of the purchase money (m)

**Purchase of  
land from  
incapacitated  
persons cor-  
porations and  
trustees**

**407** Where sites are purchased from incapacitated persons corporations and trustees authorised by the Act to sell other than the Chancellor and Council of the Duchy of Lancaster and the officers of the Duchy of Cornwall the application of the purchase money is regulated by the Lands Clauses Consolidation Act, 1845 (n)

**SUB SECT 5—Dealings by Trustees of Institution**

**Sale or  
exchange of  
land**

**408** Land or buildings held in trust for a literary and scientific institution may if a sale or exchange is deemed advisable be sold by trustees having the legal estate by the direction or with the consent of the governing body if any or exchanged for other land or building suitable to the purposes of the trust Moneys received to equalise an exchange and moneys arising from a sale are applicable in the purchase of another site or in the improvement of other premises to be used for the purposes of the trust (o)

**Lending of  
premises**

Similarly trustees with the legal estate may with like direction or consent let portions of the premises belonging to the institution not required for its purposes and apply the rents for the benefit of the institution (p)

**No general  
power to  
borrow**

**409** A literary and scientific institution unlike a commercial or trading undertaking has no implied power to borrow money for the purposes of its business Nor does the power of sale above mentioned include a power to borrow (q)

**Power to  
borrow for  
rates taxes  
charges costs  
and expenses.**

The trustees of such an institution may however to indemnify themselves against the payment of any rate tax charge costs or expenses to which as such trustees and legal owners of the building

(l) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 9

(m) *Ibid* s 16

(n) s 8 & 9 Vict c 16 69—178 see Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 17 and generally title COMPULSORY PURCHASE OF LAND AND CONSOLIDATION Vol VI pp 111 *et seq*

(o) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 18

(p) *Ibid*

(q) *Re Laid, Vinsell & Charn (Liquidators)* [1905] 1 Ch 568

or premises they have become liable (r) mortgage or sell the premises or a part thereof free from the trusts of the institution and apply the proceeds to their reimbursement and any balance to the benefit of the institution (s). This power enables trustees to borrow in order to pay for necessary repairs to the premises of the institution but not for enlarging and improving them at any rate where the improvement consists in providing a billiard room (t)

SECT 1  
Land

Extent of  
power

SUB SECT 6 — *Provisions applicable when Site created by deed*

**410** If land or any part of land given for the purposes of an institution ceases to be so used it immediately reverts to and becomes a portion of the estate or minor or possessions of the Duchy of Lancaster or Cornwall out of which it was carved (a). But where the institution is removed to another site the land previously occupied unless it originally formed part of the possessions of the Duchies of Lancaster or Cornwall may be exchanged or sold for the benefit of the institution and money received for equality of exchange or on a sale may be applied towards the erection or establishment of the institution upon the new site (a)

Reverter

#### SECT 2 — *Personality*

**411** Money, securities for money goods chattels and personal effects belonging to an institution and not vested in trustees in the case of incorporated institutions where there is no provision applicable to their personal property and in all cases of unincorporated institutions are deemed to be vested for the time being in the governing body (b)

In whom  
vested

## Part III — Internal Regulation

#### SECT 1 — *Governing Body*

**412** The governing body of an institution are the council directors committee or other body to whom by Act of Parliament charter or the rules and regulations of the institution the management of its affairs is entrusted (c). If on the establishment of the

Constitution.

(r) It is the duty of the governing body to indemnify the trustees (Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 19)

(s) *Ibid*. This power is subject to the restrictions contained in the Act with regard to lands given and land belonging to the Duchies of Lancaster and Cornwall (*ibid*) as to which see *supra* s 4 and the text *infra*

(t) *Pe Badger Mansell v Cobham (Viscount)* [1905] 1 Ch 565

(a) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 4. For other instances of reverter clauses see titles CHARITIES Vol IV p 160 note (m). EDUCATION Vol VII p 119 and see Places of Worship Sites Act 1882 (45 & 46 Vict c 21) s 2. *A G v Shadwell* [1910] 1 Ch 92

(b) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112), s 20

(c) *Ibid* s 32.

**SECT 1**  
**Governing Body** institution no such body was constituted, the members may upon due notice create a governing body (*d*)

**Powers of governing body to make bye laws**

**413** In any institution the governing body, if not otherwise legally empowered to do so may at a meeting specially convened according to its regulations (1) make bye laws to regulate the institution its members and officers and to further its objects and (2) impose a reasonable penalty for breach of any bye law (*e*)

**Recovery of penalties for breach of bye laws**

Penalties for the breach of bye laws when accrued are recoverable at the option of the governing body in any local court of the district where the defendant resides or the institution is situated but no pecuniary penalty imposed by any bye law is recoverable unless the bye law has been confirmed by the votes of three fifths of the members present at a meeting specially convened (*e*)

### SECT 2—*Members and their Liabilities*

**Who are members**

**414** For the purposes of the Act (*f*) a member of an institution is a person who (1) has been admitted according to the rules of the institution and (2) has paid a subscription or (3) has signed the roll or list of members (*f*)

No member is entitled to vote or to be counted a member in any proceedings under the Act (*g*) if his current subscription is for the time being in arrear

**Liability to be sued**

**415** A member may be sued by an institution (1) if his subscription is in arrear (2) for possessing himself of and detaining property belonging to the institution contrary to the rules and (3) for injuring or destroying property belonging to the institution (*h*) If the action against the member so sued fails and he is adjudged his costs he may elect to recover them from the officer in whose name the proceedings were taken or from the institution In the latter case the member is entitled to have process against the property of the institution (*i*)

**Liability to be prosecuted**

A member of an institution may be prosecuted for theft or embezzlement of the money securities for money goods and chattels of the institution or for wilful and malicious destruction or injury to the property of the institution or for forgery exposing the funds of the institution to loss and if convicted punished in like manner as any non member found guilty of a like offence (*k*)

### SECT 3—*Alteration of Purposes and Amalgamation*

**Alteration of purpose**

**416** Where an institution (other than an institution having a royal charter or established by or acting under a statute) has been established for some particular purpose and the governing body

(*d*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict c 112) s 32

(*e*) *Ibid* s 24

(*f*) *Ibid* s 31

(*g*) *Ibid*

(*h*) *Ibid* s 25 Compare title CRIMINAL LAW AND PROCEDURE Vol IX, p 787

(*i*) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 25

(*k*) *Ibid*, s 26 See title CRIMINAL LAW AND PROCEDURE Vol IX, pp 650, 768

thinks that an alteration, extension, or abridgment of that purpose or an amalgamation with any other institution, is advisable, the proposed modification or amalgamation may be submitted by the governing body to the members in a written or printed report, and a special meeting may be convened to consider it. But no proposition may be carried into effect unless (1) the report has been delivered or sent by post to every member ten days before the special meeting or (2) the proposition has been approved by the votes of three fifths of the members present at such meeting and has been confirmed in like manner at a second special meeting held one month afterwards (l).

SECT 3  
Alteration  
of Purposes  
and Amalgama-  
tion

If not less than two fifths of the members of an institution consider that a proposition carried in the above manner is calculated to injure the institution they may within three months after the confirmation apply in writing to the Board of Trade and the Board may at its discretion forbid the proposition being carried into effect. But such decision will not prevent the members from reconsidering the same proposition on a future occasion (m).

Appeal  
to Board of  
Trade  
against  
approved  
proposition.

#### SECT 4—*Transfer to Local Authority*

417 The managers (n) of any institution to which the Act (o) applies may make an arrangement with any local authority (p) for transferring the institution to the authority which may assent and give effect to the arrangement (q).

Transfer to  
local  
authority

## Part IV—Legal Proceedings

418 In all legal proceedings the moneys, securities, goods, chattels, and effects belonging to incorporated institutions which have no provision for the vesting of their personal property, or belonging to unincorporated institutions and not vested in trustees, may be described as belonging to the governing body (by their proper title) (r).

Description  
of personal  
property in  
legal  
proceedings

(l) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 27.

(m) *Ibid* s 28. The Board of Trade has taken the place of the Lords of the Committee of the Privy Council for Trade and Foreign Plantations see title CONSTITUTIONAL LAW Vol VII p 102.

(n) This expression includes all persons who have the management of any institution whether the local interest in the site and buildings of the institution is vested in them or not (Schools for Science and Art Act 1891 (54 & 55 Vict c 61) s 1 (c)).

(o) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112) s 33.

(p) *I.e.* the council of any county or borough and any urban sanitary authority within the meaning of the Public Health Acts (Technical Instruction Act 1869 (32 & 53 Vict c 76) s 4. Schools for Science and Art Act 1891 (54 & 55 Vict c 61) s 1 (1)).

(q) Schools for Science and Art Act 1891 (54 & 55 Vict c 61) s 1 (1). As to the provisions applicable to arrangements for transfer see *ibid* s 1 (2) and title EDUCATION Vol XII p 24.

(r) Literary and Scientific Institutions Act 1854 (17 & 18 Vict c 112).

## PART IV

## Legal Proceedings

Name by which to sue and be sued

**419** Incorporated institutions which are not entitled to sue and be sued by any corporate name and unincorporated institutions may sue or be sued in the name of the president chairman, principal secretary or clerk as determined by the rules of the institution or if the rules are silent in the name of the person appointed for this purpose by the governing body. Any person having a claim or demand against the institution may sue the president or chairman if upon application to the governing body some other officer or person is not nominated to be the defendant (s)

Abandonment of suit

The death or retirement from office of a plaintiff or defendant does not cause the abatement or discontinuance of civil proceedings brought by or against an institution. The proceedings are continued in the name of or against the successor of such person (t)

Judgments recovered against the nominees of an institution are enforceable against the property of the institution and not against the property or bodies of their nominees (a)

## Part V — Privileges

SECTION 1 — *Exemption from Rates*

Exemptions under Scientific Societies Act 1843

**420** The Scientific Societies Act 1843 (b) exempts from the payment of rates such societies as comply with the following four conditions — the society must be (1) instituted for the purpose of science literature or the fine arts exclusively (2) supported wholly or in part by annual voluntary contributions (3) one which does not and may not by its laws make any dividend gift division, or bonus in money to or between any of its members (4) one which has obtained the prescribed certificate from the Registrar of Friendly Societies (c)

Municipal library

A free library owned and occupied by a municipal corporation through a library committee is not exempt as it is not owned by a society for the purposes of science literature or the fine arts (d)

- (s) Literary and Scientific Institutions Act 1854 (1 & 16 Vict c 112) s 21  
 (t) *Illid* s 3  
 (a) *Illid* s 2. As to writ of replevin see *Illid* and R S C Ord 17 r 4 (order to carry on proceedings). As to execution see title EXECUTION Vol XIV p 14  
 (b) *Stat* Act c 6  
 (c) *Illid* s 1. See *Society of Clergymen v Art Union of London* [1896] A C 290. *Illid* s 1. See *Society of Clergymen v Art Union of London v Society Overseers* [1894] 2 Q B 603. *C A Infant Revenue Commissioners v Forrest* (1890) 15 App Cas 343 as to general purport of exemption and see generally title RATES AND RATING  
 (d) *Liverpool Corporation v West Derby Union* (1905) 69 J P 217 explained by *Midland J in Hornsey v Coll of Art v Edmonton Union Assessment Committee and Hornsey Overseers* (1905) 10 J P 121 at p 124. Secus as regards property tax see *Manchester Corporation v McAlam* [1896] A C 500 and p 208 post

**421** To be entitled to exemption a society in the first place must be established exclusively (e) for the purpose of disseminating or propagating (f) science (g) literature or the fine arts (h)

If the advantage and acquisition of science taken generally is the main and substantial object of an association the necessary concomitant of advantage and enjoyment to the individual members does not destroy the exemption (i). But societies founded for the gratification or convenience of members only and not for the good of others are not within the exemption (l)

# **SECT 1** **Exemption from Rates**

Established exclusively for disseminating or propagating science etc.

(e) The word exclusively anxiously introduced both into the preamble and the enactment (*R v Thburn* (1851) 16 Q L 450 per Lord CAMPBELL C J at p 491) Societies held exempt as being exclusively established for the purposes mentioned in the Scientific Societies Act 1813 (6 & 7 vict c 36) include the Innman Society (St Anne Westminster (Churchwardens) v Innman Society of London (1841) 3 L & L 111) the Geological Society (Ryde Metropolitan Authority v the Royal College of Music (Royal College of Music v Westminster Vestry [1898] 1 Q B 509 C A) the Institution of Civil Engineers (*P v Institution of Civil Engineers* (1879) 1 Q B D 48 where this institution was held not exempt but according to HAWKINS J in *Royal College of Music v Westminster Vestry* [1898] 1 Q B 304 313 the earlier case was virtually overruled by *Inland Revenue Commissioners v Forrest* (1890) 15 App Cas 331) Botanic Gardens Oxford (*Oxford Poor Rate Case* (1851) 8 F & B 181) Harnsey School of Art (*Harnsey School of Art v Aldmont Union* (1900) 94 L L 203) Certain circulating libraries (*Birmingham (Churchwardens) v Shaw* (1849) 10 Q B 868 *Bradford Library Society v Bradford (Churchwardens)* (1858) 1 L & E 88 *Liverpool Library v Liverpool Corporation* (1860) 5 H & N 526) were also held exempt as being exclusively established for the purposes mentioned in the Act but having regard to the judgment of the House of Lords in *Savoy Overseers etc v Art Union of London* [1896] A C 296 the cases cited above relating to circulating libraries must be deemed of doubtful authority. The London Library lost the right to exemption owing to part of its premises being underlet (*Clarendon (Lib) v St James's Westminster (For etc)* (1801) 10 C B 806)

Societies held not exempt include societies for diffusion of religious principles (*R v Jones* (1846) 8 Q L 719) societies for promoting the education of the labouring classes (*R v Locock* (1846) 8 Q B 129 *Scott v St Martin in the Fields (Churchwardens)* (1855) 5 L & B 558) libraries with newsrooms attached (*R v Hullis* (1848) 8 Q B 145 *R v Gaskell* (1851) 16 Q B 412 *Russell Institution v St Giles in the Fields Vestry* (1854) 3 F & B 416 *Purshas v Holy Sepulchre Cambridge (Churchwardens)* (1854) 4 F & B 156) musical societies for amusement of members (*R v Brandt* 1851) 16 Q B 462) the United Service Institution (*R v Colburn supra* S C sub nom (*R v St Martin in the Fields (Churchwardens and Overseers)* 21 I J (M C) 53) the Zoological Society (*R v Zoological Society of London* (1854) 23 L J (M C) 139 (held not a society for purposes of science only)) the Jenner Institute (*Jenner Institute of Preventive Medicine v St George's Hanover Square Assessment Committee and Surveyor of Taxes* (1900) 69 I J (Q B) 814) Leighton House (*Leighton House Management Committee v Kensington Corporation* (1905) 1 Konstans Rating Appeals 1)

(f) *Royal College of Music v Westminster Vestry supra* at p 815

(g) The term science includes physio surgery pure science and applied science (*R v Royal Medical and Chirurgical Society of London* (1851) 21 J P 789 191) See further as to meaning of science *Inland Revenue Commissioners v Forrest supra* at pp 339 343 354

(h) The difference between fine art and professional art was pointed out in *R v Colburn supra* and between the arts and the fine arts in *R v Institution of Civil Engineers supra* at p 52 Music is one of the fine arts (*Royal College of Music v Westminster Vestry supra* at p 815)

(i) *R v Institution of Civil Engineers supra* at pp 52 53 *Bradford Library Society v Bradford (Churchwardens) supra*

(k) *R v Brandt supra* *R v Gaskell supra* *R v Colburn supra*



## SECT 1

**Exemption from Rates**

Supported wholly or in part by annual voluntary contributions Government grant a voluntary contribution

**422** When the contributions of members are the price paid for a purchase either of goods or advantages the institution cannot properly be said to be supported by voluntary contributions merely because the persons making the payments are under no obligation to do so (*l*) In this connection the expression 'voluntary contributions' conveys the essential idea that the payments are a gratuitous offering for the benefit of others and not the price of an advantage purchased by a contributor (*m*) A Government grant (*n*) and a sum paid by a county council under the powers of the Education Act 1902 (*a*) are annual voluntary contributions within the meaning of the Scientific Societies Act 1843 (*b*) A society otherwise entitled to exemption does not lose that right by receiving money in respect of the exhibition and sale of works of art on its premises (*c*) In order that a society may be entitled to exemption the amount of the annual voluntary contribution received by it must form a substantial part of its income (*d*)

Prohibition against dividends

**423** A society is not exempted unless its rules expressly provide against any money dividend being distributed among its members It is not sufficient that no dividend has in fact ever been made (*e*) The word 'dividend' points to something in the nature of a dividend gift or bonus which is paid to members of the society as such and does not include payments made to members of the society by way of remuneration for services such as teaching (*f*)

Occupation of buildings by society

**424** To enable a society to obtain exemption the buildings belonging to it must be occupied by the society for the transaction

(*l*) *Savoy Overseers etc v Art Union of London* [1896] 1 C 296 per Lord HERSCHELL at p 307 In that case the society was admittedly established for the purposes of the fine arts exclusively but every member received each year in return for his subscription of a guinea a copy of an engraving and in addition one chance in the annual distribution of prize thereby preventing the society being one supported wholly or in part by annual voluntary contributions

(*m*) *Ibid* per Lord HERSCHELL at p 310 *A G v Smyth* [1905] 2 I R 553 564 *R v Zoological Society of London* (1854) 25 L J (M C) 139 compare *Re New University Club Estate Duty* (1887) 18 Q B D 720 (fund voluntarily contributed within the meaning of the Customs and Inland Revenue Act 1885 (48 & 49 Vict c 51) s 11 (6))

(*n*) *Royal College of Music v Westminster Vestry* [1898] 1 Q B 809 C A 8 C (1897) 67 L J (Q B) 80 84

(*a*) 2 Edw 7 c 42 *Hornsey School of Art v Edmonton Union Assessment Committee and Hornsey Overseers* (1905) 10 J P 171

(*b*) 6 & 7 Vict c 36

(*c*) *R v Manchester Overseers* (1851) 16 Q B 449

(*d*) *Leighton House Management Committee v Kensington Corporation* (1905) 1 Konstam s Rating Appeal 1

(*e*) See *R v Jones* (1846) 8 Q B 119 (Religious Tract Society)

(*f*) *Royal College of Music v Westminster Vestry* *supra* at p 819 The Scientific Societies Act 184 (6 & 7 Vict c 36) does not however prevent a division upon dissolution among the members See *Birmingham (Churchwardens) v Shaw* (1849) 10 Q B 565 *R v Manchester Overseers* *supra* But as to dissolution of literary and scientific institutions see p 209 *post*

of its business (7) A society otherwise entitled to exemption loses that right by subletting its buildings or some part of them (h) unless the occupation of the subordinate occupier is of such a character as to render him separately rateable (i) The residence of a librarian or porter on the premises of a society (k), or the lending on one occasion only of a building for purposes other than those of the society to which it belongs does not take away the right of exemption (l)

# SECT 1 Exemption from Rates

Effect of  
letting  
buildings

**425** The certificate of the Registrar of Friendly Societies (m) is not made conclusive proof of the other statutory requisites (n) having been complied with It merely is one of the several conditions precedent which must all concur to give a right of exemption (o)

Certificate of  
Registrar of  
Friendly  
Societies

To be entitled to the exemption a society must submit to the Registrar of Friendly Societies three copies of its rules signed by the chief officer three members of the council or committee of management and the secretary (p) The Registrar must either give a certificate (q) on each copy that the society is entitled to exemption, or he must state in writing his reason for withholding the certificate If the certificate is granted one certified copy of the rules is returned to the society another retained by the registrar and the third sent to the clerk of the peace for the borough or county in which the land or buildings claimed to be exempted is or are situated (r) The rules are filed by the county or borough council no fee being payable for registration (s)

Submission of  
rules to  
Registrar of  
Friendly  
Societies

If alterations are made in the certified rules of a society affecting the property or constitution of the society, the alterations must within one month be submitted for certification by the Registrar of Friendly Societies, the society being in the meanwhile entitled to

Registration  
of rules

Alteration of  
certified rules  
certificate

(g) Scientific Societies Act 1843 (6 & 7 Vict c 36) s 1

(h) *Puriss v Trasill* (1849) 3 Lxch 344 *Clarendon (Earl) v St James's Westminster (Rector etc)* (1851) 10 C B 806 (London Library portions of premises let to other scientific societies) *R v Royal Medical and Chirurgical Society of London* (1857) 21 J P 189

(i) *Jenner Institute of Preventive Medicine v St George's Hanover Square Assessment Committee and Surveyor of Taxes* (1900) 69 J J (Q B) 814 per HANNELL J at p 819 *R v Manchester Overseers* (1851) 16 Q B 449 See *St Anne Westminster (Churchwardens) v Linnean Society of London* (1854) 3 J & B 793

(k) *St Anne Westminster (Churchwardens) v Linnean Society of London* *supra*

(l) *R v Brandt* (1801) 16 Q B 462 411

(m) This official takes the place of the barrister appointed to certify the rules of friendly societies see Friendly Societies Act 1896 (59 & 60 Vict c 25) s 2 and title FRIENDLY SOCIETIES Vol XV p 129

(n) As to the statutory requisites see p 204 *ante*

(o) *R v Pocock* (1846) 8 Q B 729 *R v Phillips* (1848) 8 Q B 746 For form of certificate, see *Hornsey School of Art v Edmonton Union Assessment Committee and Hornsey Overseers* (1905) 10 J P 121 123

(p) See note (m) *supra*

(q) The fee payable to the Registrar for perusing rules and alterations and granting a certificate must not exceed one guinea (Scientific Societies Act 1843 (6 & 7 Vict c 36) s 4)

(r) *Ibid* s 2

(s) *Ibid* Local Government Act 1888 (51 & 52 Vict c 41) ss 3 (xv) 34

(a), 35 (1), 36 (1) 37, 38 (5)

## SECT 1

**Exemption from Rates**

Appeal from refusal to grant certificate

Appeal against exemption

Appeal against rate wrongfully made

**exemption** A refusal to certify the alteration subject to an appeal by the society deprives the society of exemption as from the date when the alteration came into operation (*t*)

An appeal by a society lies to quarter sessions from a refusal by the registrar to grant a certificate (*u*) Any person assessed to any rate from which a society is exempted may appeal from the decision of the registrar granting the certificate to quarter sessions (*a*)

Where a society which has received the prescribed certificate is nevertheless rated an appeal must be made as no reliance can be placed upon the statutory exemption as a ground for refusing to pay the rate (*b*) There is nothing to prevent a local authority from rating a society even though exemption has been allowed for many years under the certificate (*c*)

SECT 2 — *Exemption from Property Tax*

Exemption from property tax

**426** The extent to which buildings the property (*d*) of a literary and scientific institution (*e*) are exempt from property tax is dealt with elsewhere (*f*)

Where the scientific or literary purposes of a society tend to the advancement of objects of general public utility such society is a charitable institution (*g*) and as such its income is exempt from income tax under the Income Tax Act 1842 (*h*)

SECT 3 — *Exemption from Corporation Tax*

Exemption from corporation tax

**427** The duty imposed on the property of bodies corporate and unincorporate to compensate the revenue for the loss of probate (now estate) legacy or succession duties for which such bodies escape liability is not payable in the case of property appropriated

(*t*) Scientific Societies Act 1843 (6 & 7 Vict c 36) s 3

(*u*) *Ibid* s 5

(*a*) *Ibid* s 6 As to courts of quarter sessions see title MAGISTRATES If the order of the sessions is good on the face of it the King's Bench Division will not interfere on certiorari (*R v Stacey* (1830) 14 Q B 159) As to the time within which an appeal must be made see Scientific Societies Act 1843 (6 & 7 Vict c 36) s 6 *R v Pocock* (1846) 6 Q B 779

(*b*) *Birmingham (Churchwardens) v Shaw* (1849) 10 Q B 865

(*c*) *Ibid* See *Russell Institution v St Giles in the Fields Vestry* (1854) 3 E & B 416

(*d*) The word property in the Income Tax Act 1842 (5 & 6 Vict c 30) s 61 does not necessarily import ownership it means also appropriation to the purposes of the institution (*Manchester Corporation v McAdam* [1896] A C 500)

(*e*) The essential idea conveyed by the word institution in connection with such adjectives as literary and scientific is often no more than a system scheme or arrangement by which literature or science is promoted without reference to the persons with whom the management may rest or in whom the property appropriated for these purposes may be vested save in so far as these may be regarded as a part of such system scheme or arrangement (*Manchester Corporation v McAdam supra per Lord HERSCHELL at p 501*)

(*f*) See titles CHARITIES Vol IV p 208 INCOME TAX Vol XVI pp 629 630

(*g*) *Beaumont v Oliveira* (1869) 4 Ch App 309 *Royal Society of London v Thompson* (1881) 17 Ch D 401 *Thomas v Howell* (1814) L R 18 Eq 198

(*h*) 5 & 6 Vict c 35 ss 58 58 Sched C see also *ibid* Sched C r 3 s 100, Sched D s 105 and title CHARITIES Vol IV pp 208 209

and applied for the promotion of literature science, or the fine arts (i) If the main object of an institution is the promotion of science the existence of subsidiary objects does not deprive the institution of the exemption (k) The property of the Institution of Civil Engineers is exempt (l) but not that of the Royal College of Surgeons of England (m) or the Royal College of Surgeons Edinburgh (n) or of the Society of Writers to the Signet (o)

SECT 3  
Exemption  
from  
Corporation  
Tax

SECT 4 — *Exemption from Reversion Duty Undeveloped Land Duty and Increment Value Duty*

**428** Land or any interest in land held by a governing body constituted for charitable purposes including corporations sole universities colleges schools and other institutions for the promotion of literature science or art is exempt from reversion and undeveloped land duty while the land is occupied and used for the purposes of such body similarly such land is exempt from increment value duty whether it is occupied or used by such body or not (p)

Exemption  
from taxes on  
land values

## Part VI — Dissolution

**429** Three fifths or any larger number of members may determine that an institution shall be dissolved either immediately or at the time then agreed upon In such event all necessary steps must be taken for the disposal and settlement of the property of the institution its claims and liabilities according to the rules or if the rules are inapplicable then at the discretion of the governing body (q) In the event of a dispute among the governing body or members the adjustment of the affairs of the institution is to be referred to the county court judge of the district where the principal building of the institution is situated The judge may make the requisite orders or if he finds it necessary may direct proceedings to be taken in the Chancery Division of the High Court (r)

Under  
Literary and  
Scientific  
Institutions  
Act 18 4

**430** Upon the dissolution of an institution to which the Act (s) applies the property remaining after all debts and liabilities have been satisfied, is not divisible among the members It must be

Application  
of property

(i) Customs and Inland Revenue Act 1885 (48 & 49 Vict c 51) s 11 (j) See also title CORPORATIONS Vol VIII p 311

(k) *Inland Revenue Commissioners v Forester* (1890) 15 App Cas 334

(l) *Ibid* affirming *Re Institution of Civil Engineers Estate Duty* (1888) 20 Q B D 621 C A

(m) *Re Royal College of Surgeons of England*, [1899] 1 Q B 811 C A

(n) *Sulley (Surveyor of Taxes) v Royal College of Surgeons* (1892) 29 Sc L R 620

(o) *Society of Writers to the Signet Petitioners* (1886) 24 Sc L R 27

(p) Finance (1909 10) Act 1910 (10 Edw 7 c 8) s 31 (1) See further title REVENUE

(q) Literary and Scientific Institutions Act 1804 (17 & 18 Vict c 112) s 29

(r) *Ibid* And see title COUNTY COURTS Vol VIII pp 660 666

(s) Literary and Scientific Institutions Act 1804 (17 & 18 Vict c 112) s 30 See *Re Dutton* (1878) 4 Ex D 24 59

**PART VI**  
**Dissolution**

given to some kindred institution chosen by the members of the dissolving institution or in default by the county court judge (t), notwithstanding that the rules contain a provision for the division of the property of the society upon dissolution among the share holders (u). This rule does not apply to an institution founded or established by the contributions of shareholders in the nature of a joint stock company (v).

Under  
Companies  
Consolidation  
Act 1908

As a literary institution carries on no business, probably it cannot be wound up as an unregistered company (w).

## Part VII—Particular Institutions

### SECT 1—*The British Museum*

#### SUB SECT 1—*Constitution*

Trustees—

**431** The trustees of the British Museum (x) are a corporate body, consisting of (1) official trustees namely the holders for the

(t) See note (r) p 209 *ante*

(u) *Re Bristol Athenæum* (1889) 43 Ch D 236

(v) Literary and Scientific Institutions Act 1854 (1 & 18 Vict c 112) s 30 *Fg* a literary and scientific institution founded and established by the issue of transferable shares entitling their holders to the property of the institution but bearing no dividend (*Re Russell Institution Figgins v Baghino* [1898] 2 Ch 72) or an institution having a common property arising out of the subscriptions of members such property being held by numerous persons in transferable shares (*Re Jones Clegg v Lillison* [1898] 2 Ch 83). In both these cases the dictum of KAY J in *Re Bristol Athenæum supra* at p 209 that an institution which was not a joint stock company was not within the proviso of the Literary and Scientific Institutions Act 1854 (1 & 18 Vict c 112) s 30 was commented upon with disapproval.

(w) See *Re Bristol Athenæum supra* (a case decided on the Companies Act 1862 (25 & 26 Vict c 89) s 199). *Re Jones Clegg v Lillison supra*. *Re Russell Institution Figgins v Baghino supra*. As to winding up of unregistered companies see title COMPANIES Vol V pp 641 *et seq*.

(x) The British Museum was established in 1753. The stat (1753) 26 Geo 2 c 22 which incorporated the trustees of the British Museum and vested the management of the museum in them authorised the purchase of the museum or collection of Sir Hans Sloane (for £20 000) and the Harleian collection of manuscripts (for £10 000). It further provided for the erection of a general repository for the reception of the collections mentioned above and all additions and of the Cottonian Library for preservation for public use. The necessary moneys were to be raised by lottery (*ibid* ss 24—49). The Cottonian Library consisting of manuscripts and other writings was acquired by the nation with a number of coins medals and other rarities from Sir Robert Cotton in 1700 see stat (1700) 12 & 13 Will 3 c 7 amended by stat (1706) 6 Ann c 30. Other special collections forming part of the British Museum include the Downley collection (see stat (1805) 40 Geo 3 c 127) the Elgin Marbles (see stat (1816) 36 Geo 3 c 99) and the Payne Knight collection of coins medals etc (see stat (1824) 5 Geo 4 c 60). Among other important accessions to the contents of the museum may be mentioned the Royal Library of printed books and manuscripts collected by former Sovereigns of the Realm from the time of King Henry VII presented by George II (see recital to stat (1832) 2 & 3 Will 4 c 46) a collection of pamphlets and periodical papers presented by George III (see recital to stat (1832) 2 & 3 Will 4, c 46) a library of 70 000 volumes and a collection of coins

time being of certain high offices of state, including the Archbishop of Canterbury the Lord Chancellor, the Speaker of the House of Commons, and many other distinguished persons (*y*), (2) certain family trustees representing the donors of the more important collections belonging to the museum (*z*) (3) a trustee appointed by the Crown (*a*) and fifteen elected trustees (*b*)

SECT 1  
The British  
Museum

**432** On the death or retirement (*c*) of a trustee other than an *ex officio* trustee or a family trustee a new trustee to fill the vacancy may be elected by a majority of the official family and royal trustees of whom at least seven including the Archbishop of Canterbury, the Lord Chancellor, and the Speaker of the House of Commons or any two of them must be present The elected trustees do not take part in such election (*d*)

Appointment  
of new  
trustees in  
case of  
vacancies

Family trustees are chosen by the respective families which they represent (*e*)

**433** The principal official is the principal librarian who is appointed by the Crown from two persons recommended by the Archbishop of Canterbury the Lord Chancellor and the Speaker of the House of Commons or any two of them (*f*)

Appointment  
of principal  
librarian

The nomination of the rest of the staff is made by the Archbishop of Canterbury the Lord Chancellor and the Speaker or any two of them (*g*)

Nomination  
of staff

#### SUB SECT 2 — Powers of the Trustees

**434** Acts done or orders given by a majority of the British Museum trustees of whom at least seven are present at a general meeting have the same effect as if done by the majority of the whole number of the trustees (*h*)

General  
powers

The trustees may sue and be sued in their corporate name use a common seal and make bye laws and rules for administering the museum and preserving the various collections (*i*) They may fix the salaries of and suspend or dismiss officers and servants (*j*)

and medals etc presented by George IV (see recital to stat (1832) 2 & 3 Will 4 c 46) In 1753 Old Montagu House Great Russell Street Bloomsbury subsequently known as the British Museum was vested in the museum trustees for the purposes of a general repository (Private Act (1755) 28 Geo 2 c 3 see stat (1753) 26 Geo 2 c 22 s 21) The acquisition by the trustees of other lands for the enlargement of the museum was authorised by later statutes see stats (1824) 5 Geo 4 c 39 (1839) 2 & 3 Vict c 10 British Museum (Purchase of Land) Act 1894 (57 & 58 Vict c 34)

(*y*) Stats (1753) 26 Geo 2 c 22 s 4 (1824) 5 Geo 4 c 39

(*z*) Stats (1753) 26 Geo 2 c 22 s 4 (Cotton Harley and Sloane families) (1805) 45 Geo 3 c 127 (Townley family) (1816) 56 Geo 3 c 99 (Earl of Elgin) (1824) 5 Geo 4 c 60 (Payne Knight family)

(*a*) Stat (1832) 2 & Will 4 c 46

(*b*) Stat (1753) 26 Geo 2 c 22 s 4 The fifteen trustees are nominated by the non elected trustees

(*c*) Originally the trustees were appointed for life but by stat (1824) 5 Geo 4 c 39 they were empowered to retire

(*d*) Stat (1753) 26 Geo 2 c 22 s 4 stat (1754) 27 Geo 2 c 16 c 3

(*e*) Stat (1753) 26 Geo 2 c 22 ss 5 8

(*f*) *Ibid* s 16

(*g*) *Ibid* s 17

(*h*) Stat (1754) 27 Geo 2 c 16 s 3

(*i*) Stat (1803) 26 Geo 2 c 22 ss 14 15

(*j*) *Ibid* s 1

## SECT 1

**The British Museum**

Power to take land to any amount

Power to dispose of duplicates

Power to exchange or dispose of any articles

Removal of portion of collection to South Kensington

to National Gallery and National Portrait Gallery

Power to remove newspapers for storage

**435** The trustees of the British Museum have power to purchase take hold and enjoy any gifts grants devises and bequests of lands and any interest therein and any money charged thereon, and to arise from the sale of lands and to any value and amount (*k*)

**436** Duplicate works objects or specimens not required for the purposes of the museum may with certain exceptions (*l*) be given away by the trustees (*m*) The trustees or any five of them may exchange sell or dispose of any duplicates of printed books medals coins or other curiosities and lay out the moneys arising from a sale in the purchase of other things required for the museum (*n*)

Any seven or more of the trustees including the Archbishop of Canterbury the Lord Chancellor and the Speaker of the House of Commons or any two of them may at a meeting specially convened for the purpose order that any articles in the museum which they consider unfit to be preserved shall be exchanged for manuscripts books medals coins statues or other things more suited in their opinion to the existing collections or may direct them to be sold or disposed of (*o*)

**437** Owing to the extension of the literary science and art departments of the British Museum further housing space was required and the trustees were authorised with the consent of the Treasury Commissioners to remove certain collections (*p*) to the Natural History Museum then being erected at South Kensington (*q*)

The trustees of the British Museum were further authorised subject to the same consent to deliver all or any of the pictures belonging to them to the trustees and directors of the National Gallery or to the trustees of the National Portrait Gallery (*r*)

The trustees of the British Museum may with the consent of the Treasury remove newspapers and other printed matter which appear to be rarely required for public use to a building at Hendon erected to provide the necessary storage space The newspapers and printed matter so removed must be made available for public use at the present British Museum buildings on due notice being given (*s*)

(*k*) Stat (1833) 26 Geo 2 c 22 s 14 (lands not exceeding in yearly value £500) (1824) 3 Geo 4 c 33 (lands of any value) Prior to the later Act a gift of the produce of land to the British Museum was void (*British Museum Trustees v White* (1876) 2 Sim & St 594)

(*l*) The exceptions are duplicate works in the Royal Library of George IV or in the Gracchus Grenville or Banksian Libraries and objects presented to the museum for use and preservation therein (*British Museum Act 1818* (41 & 42 Vict c 55) s 3) Questions as to which collection any particular object in the British Museum belongs are determinable finally by the trustees (*ibid* s 4)

(*m*) *Id* s 5

(*n*) Stat (1861) 7 Geo 3 c 18

(*o*) Stat (1807) 47 Geo 3 sess 2 c 36

(*p*) Namely collections belonging to the following departments Zoology Geology and Palæontology Mineralogy and Potany

(*q*) *British Museum Act 1818* (41 & 42 Vict c 55) s 1

(*r*) *Id* s 2 As to these institutions see p 213 and note (*a*) *sup* post

(*s*) *British Museum Act 1807* (21 dw 7 c 12) s 1

SUB SECT 3—*Privileges of the Museum.*

## SECT 1

## The British Museum

**438** A printed copy of every published book and of every subsequent edition containing alterations must within a certain period after publication be delivered on behalf of the publisher at the British Museum (*t*) This provision does not apply to books first published in a foreign country and afterwards copyrighted within His Majesty's dominions (*u*)

Right to copies of books.

The British Museum is exempt from the jurisdiction of the Charity Commissioners (*v*)

Exemption from Charitable Trusts Acts

Lands vested in the trustees of the British Museum are exempt from property tax (*w*)

Exemption from property tax

SECT 2—*The National Gallery*SUB SECT 1—*Constitution*

**439** The National Gallery was established in 1824 (*x*) The governing body consists of (1) ten trustees who are honorary and (2) a director appointed for five years who is a salaried official with a seat on the board (*y*) Both the trustees and the director are appointed by the First Lord of the Treasury (*a*)

Constitution

**440** The Commissioners of His Majesty's Works and Public Buildings are empowered by statute to acquire by purchase or otherwise by agreement (*b*) lands for the enlargement or improvement of the National Gallery (*c*) In the exercise of this power the Lands Clauses Consolidation Acts (*d*) are made to apply except in so far as they relate to the purchase of lands otherwise than by agreement (*c*) The consent of the Treasury to any purchase is necessary (*e*) The conveyance or assignment of the lands purchased is made to His Majesty his heirs and successors (*f*) No deeds bonds or other instruments made by to or with the Commissioners for the above purpose are subject to stamp duty (*g*)

Acquisition of land for enlargement of National Gallery

Consent of Treasury

Stamp duty

(*t*) See (copyright Act 1842 (5 & 6 Vict c 45) s 6 and title COPYRIGHT AND LITERARY PROPERTY Vol VIII pp 14 175 and see *ibid* p 141 note (*j*)

(*u*) International Copyright Act 1844 (7 & 8 Vict c 12) s 3

(*v*) Charitable Trusts Act 1853 (16 & 17 Vict c 13) s 62 Charitable Trusts Amendment Act 1855 (18 & 19 Vict c 124) s 47 As to the jurisdiction of Charity Commissioners see title CHARITIES Vol IV pp 302 *et seq*

(*w*) See title INCOME TAX Vol XVI p 29

(*x*) By a Treasury Minute 24th March 1824

(*y*) *Ibid* Treasury Minutes 24th March 1824 26th April 1894 The Tate Gallery is a branch of the National Gallery and is governed by the same board The National Portrait Gallery is a separate organisation established by a Treasury Minute 2nd December 1856 and governed by a board of trustees and a director appointed by the First Lord of the Treasury

(*a*) See title CONSTITUTIONAL LAW Vol VII p 101

(*b*) As to compulsory purchase see p 214 *post*

(*c*) National Gallery Enlargement Act 1866 (29 & 30 Vict c 83) s 16 Power to acquire land for the National Portrait Gallery was conferred by the National Portrait Gallery Act 1859 (21 & 22 Vict c 25) See also the National Gallery and St James's Park Act 1911 (1 & 2 Geo 5 c 23) by which certain lands heretofore used for the purposes of St George's Barrack are to be appropriated for the purposes of the National Gallery and the National Portrait Gallery

(*d*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 1 *et seq*

(*e*) National Gallery Enlargement Act 1866 (29 & 30 Vict c 83) s 20

(*f*) *Ibid* s 27

(*g*) *Ibid* s 26



## SECT 2

The  
National  
Gallery

## Enrolment

Compulsory  
acquisition  
of lands  
Control of  
funds

Conveyances assignments, and other deeds and instruments conveying or assigning land for the above purposes must be enrolled (*h*)

Several statutes have been enacted enabling lands to be compulsorily acquired for the National Gallery (*i*)

**441** The board has control of the subsidy annually voted by Parliament for the purchase of pictures, and also of the various funds which have from time to time been granted for the same purpose

SUB SECT 2—*Powers of Trustees and Directors*Sale of  
pictures in  
National  
Gallery

**442** The trustees and director of the National Gallery, or any three or more of them including the director at a special meeting for that purpose may from time to time with the consent of the Treasury Commissioners order the sale of certain pictures and works of art for the time being under the care of the trustees and director and which they adjudge to be unfit or not required as part of the national collection. This provision does not apply to works bequeathed or given to the nation. The sale must be by public auction and copies of the order to make the sale, and of the Treasury's consent must be laid on the table of both Houses of Parliament six weeks prior to the sale (*l*). The proceeds of sale are payable into the Exchequer and form part of the Consolidated Fund (*l*)

Proceeds of  
saleVesting of  
pictures given  
to the nation

**443** Pictures and works of art given or bequeathed to or for the benefit of the public or nation in the absence of a contrary provision by the donor or testator vest in and are under the care of the trustees and director of the National Gallery. In case of a bequest the trustees and director may select the pictures or works of art which they deem fit to become part of the national collection. The remainder of the works comprised in the bequest in the absence of a contrary provision will form part of the residuary estate of the testator (*m*)

Power of  
trustees and  
director to  
lend pictures  
etc

**444** Any two or more of the trustees with the director of the National Gallery present at a meeting specially held for the purpose may from time to time authorise the loan of any pictures or works of art belonging to them or under their control to authorised public galleries (*n*), for such time and subject to such conditions as

(*h*) National Gallery Enlargement Act 1866 (29 & 30 Vict c 83) s 21

(*i*) National Gallery Enlargement Act 1866 (29 & 30 Vict c 83) National Gallery Enlargement Act 1867 (30 & 31 Vict c 41) National Gallery (Purchase of Adjacent Land) Act 1901 (1 Fdw 7 c 16)

(*k*) National Gallery Act 1866 (19 & 20 Vict c 29) s 1

(*l*) *Ibid* s 2

(*m*) *Ibid* s 8 As to remission of death duties on bequests of national scientific or historic interest see titles CHARITIES Vol IV p 206 ESTATES AND OTHER DEATH DUTIES Vol XIII p 182 and see *ibid* pp 202 214 251 252

(*n*) National Gallery (Loan) Act 1883 (46 & 47 Vict c 4) s 2 The public galleries authorised by the Act are galleries situate in the United Kingdom belonging to or under the control of Government or any municipal authority or of any society or body approved by any two or more of the said trustees of the National Gallery together with the director (*ibid* s 5) The expression municipal authority is also defined in the same section

they may determine at the meeting (o) The net profits derived from any exhibition of pictures or works of art at any gallery to which such a loan may be made must be devoted altogether to the promotion of science and art (p)

SECT 2  
The  
National  
Gallery

Pictures and works of art acquired by the trustees and director under any gift or bequest may not be lent under the statutory powers until the expiration of fifteen years from the date of acquisition (q) and where any such gift or bequest is made conditionally on the articles being kept together or on terms inconsistent with a loan the statutory powers of lending are not exercisable for twenty five years from the date of acquisition (r)

Profits on  
exhibition  
Restrictions  
on loans

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(o) National Gallery (Loan) Act 1883 (46 & 47 Vict c 4) s 3

(p) *Ibid* The Act does not state by whom the profits are to be so applied

(q) *Ibid* s 4

(r) *Ibid*

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## LITERARY PROPERTY

See COPYRIGHT AND LITERARY PROPERTY

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## LIVERY SERVANTS

See REVENUE

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## LIVERY STABLE KEEPERS.

See BAIIEMENT, INNS AND INNKEEPERS

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## LLOYD'S

*See* INSURANCE.

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## LLOYD'S BONDS

*See* BONDS INSURANCE

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## LOAN SOCIETIES

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|--|---|

## Part I—Nature and Constitution

### SECT 1—Nature

**445** A loan society is an institution for establishing loan funds for the benefit of the labouring or industrious classes the repayment of the moneys lent usually being made by weekly instalments (a) Nature.

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(a) Loan Societies Act 1835 (5 & 6 Will. 4 c. 23) preamble and s. 1. Loan Societies Act 1840 (3 & 4 Vict. c. 110) s. 3. See Sched. I of the later Act (referred to in this title where the context permits as the Act) for scheme of repayment by instalments.

## SECT 1

## Nature

The object of a loan society is in most cases to afford assistance to members only but its operation need not be so restricted (*b*) Indeed the original intention of the Loan Societies Act 1835 (*c*) appears to have been to encourage societies of a semi charitable type but these are now almost wholly superseded by the mutual societies termed Friends of Labour

Loan societies certified under the Loan Societies Act 1840 (*d*) (in this title referred to as "the Act") are entitled to certain benefits (*e*) Where not otherwise expressed the word society in this title applies to such certified societies only

## SECT 2—Constitution

## SUB SECT 1—In General

## Formation

**446** Any number of persons not less than three may establish themselves as a loan society (*f*) But to obtain the benefits of the provisions of the Act (*g*) the rules of the society must be certified deposited and enrolled as thereby directed and this applies in the case of a society already established and of one about to be formed (*h*)

Acts must be  
done by  
officers  
enabled to act  
for society

**447** A loan society is not a corporation and therefore every act of an undissolved loan society must be done not by itself, but by or in the name of the treasurer trustees secretary or some other officer enabled to act for it (*i*)

(*b*) *P v Scott* (1844) 13 L J (M C) 70 12

(*c*) 5 & 6 Will 4 c 25

(*d*) 3 & 4 Vict c 110 repealing and superseding the Loan Societies Act 1835 (5 & 6 Will 1 c 23) The Loan Societies Act 1840 (3 & 4 Vict c 110) was passed as a temporary measure but was made perpetual by stat (1863) 26 & 27 Vict c 36 As to the illegality of a loan society having for its object the gain of individual members and not registered under any Act see *Shaw v Benson* (1883) 11 Q B D 563 C A *See also Ex parte Poppleton* (1884) 14 Q B D 379 and title COMPANIES Vol V pp 165 166

(*e*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 3 It is difficult says the Chief Registrar of Friendly Societies in his Report for 1905 p 4 to perceive the use of the Loan Societies Act of 1840 (3 & 4 Vict c 110) under which a few societies are certified each year The Act is obsolete and the societies which avail themselves of it serve no useful purpose as they are a form of antiquated friendly society their principal business being money lending The Act contains references to the usury laws which have long been repealed a fate which might well overtake the principal Act without much regret Notwithstanding the special authority dated 16th May 1876 granted by the Treasury for the registry of societies under the Friendly Societies Act 1896 (59 & 60 Vict c 25) for the express purpose of making loans (see title FRIENDLY SOCIETIES Vol XV p 165) a few societies are certified annually under the Act In 1910 for example four societies were certified under the Loan Societies Act 1840 (3 & 4 Vict c 110) (information received at the Central Office as to which see p 219 post) The expression money lender in the Money lenders Act 1900 (63 & 64 Vict c 51) does not apply to loan societies certified under the Loan Societies Act 1840 (3 & 4 Vict c 110) (see Money lenders Act 1900 (63 & 64 Vict c 51) s 6 (*b*))

(*f*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 3

(*g*) Loan Societies Act 1840 (3 & 4 Vict c 110)

(*h*) *Ibid* s 3 see p 213 post

(*i*) See *O'Pelly v Connor* *Same v Allen*, [1904] 2 I R 601, 847 Q A

SECT 2  
Constitu-  
tion

Actions can  
be brought or  
defended by  
trustees

**448** The trustees or trustee for the time being of a society are authorised to bring or defend any criminal or civil suit concerning the property or any claim of such society. They or he may sue and be sued in their proper names or name as trustees or trustee of the society without further description (*k*). The death of a trustee or his removal from office does not entail the discontinuance of any proceedings which may be pending. Such proceedings may be continued by or against the succeeding trustee or trustees (*l*).

**449** Treasurers and other persons entrusted with the receipt or custody of any money or securities for money belonging to a society must enter into a bond with sureties given to the trustees or trustee for the time being of the society for the faithful execution of the trust, in the sum of money required by the rules (*m*). In case of forfeiture the trustees or trustee may sue on the bond at the cost of the society. No bond or security so given need be stamped (*n*).

Security to be  
given by  
officers

SUB SECT 2—*Rules*

**450** The powers and sphere of action of a society depend upon its rules, which must be regarded as its memorandum of association or charter (*o*). The rules so far as they are not contrary to a statute are binding on the members and officers of and the persons receiving loans from the society and their representatives and on parties who become sureties for the repayment of any loan (*p*). Such persons and parties are deemed to have full notice of the enrolled rules, upon enrolment and entry in the society's books (*q*).

Effect of  
rules

**451** To secure the benefits of the Act (*r*) three copies of the rules and amendments of rules of a loan society must be submitted to the Central Office of the Registry of Friendly Societies (*s*). If satisfied that they are in conformity with the Act (*r*) the registrar (*t*) certifies them, returns one copy to the society, sends one to the county council (*u*) for enrolment and retains the third. The rules take effect from the date of certificate not of enrolment (*v*).

Enrolment  
of rules and  
amendments

(*k*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 8

(*l*) *Ibid*

(*m*) *Ibid* s 12. For form of bond see *ibid* Sched D

(*n*) *Ibid* s 12

(*o*) *Ennskillen Loan Fund Society (Treasurer) v Green* [1898] 2 I R 10 112 113

(*p*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 7

(*q*) *Ibid* see note (*u*) *infra*

(*r*) Loan Societies Act 1840 (3 & 4 Vict c 110)

See title FRIENDLY SOCIETIES Vol XV p 129

*Ibid* note (*r*)

(*u*) Formerly a copy of the rules was required to be enrolled by the clerk of the peace for the county, city or borough wherein the society was formed with the rolls of the session of the peace in his custody (Loan Societies Act 1840 (3 & 4 Vict c 110) s 4). This business was in 1888 transferred to the county council (Local Government Act, 1888 (51 & 52 Vict c 41) s 3 (*xv*)) see *ibid* ss 31 35 (1) 36 38)

(*v*) *Bradburne v Whitbread* (1843) 5 Man & G 439 a case decided on the

**SECT 3**  
**Constitution**

Rules to be  
entered in a  
book open for  
inspection  
Evidence of  
rules

**452** All rules in force for the time being for the management of a society duly enrolled must be entered in a book to be kept by an officer of the society appointed for that purpose. The book must be open to the inspection of the members and of persons receiving loans from the society (a)

**453** In all cases the entry of the rules in the society's books or a transcript deposited with the county council or a true copy of such transcript examined with the original or the copy certified by the registrar are received as evidence of such rules and no *certiorari* may be brought or allowed to remove any such rules into any court of record (b)

Copies of transcripts deposited with a county council must be supplied on payment of no other fee than the actual expense of copying (c)

Alteration  
or rescission  
of rules

**454** Rules may not be altered rescinded or repealed except at a general meeting of the members of the society. The meeting must be convened by written or printed notice signed by the secretary or president or other principal officer or clerk of the society in pursuance of the rules or in pursuance of a requisition for that purpose signed by three or more members of the society. The notice must be sent by post or otherwise to every member of the society seven clear days at least before the day appointed for the meeting. Subject to these conditions alterations or repeal of rules may be made with the concurrence of the majority of members then present (d)

## Part II — Administration

### SECT 1 — *In General*

Vesting of  
property in  
trustees

**455** Moneys securities for money and chattels belonging to a society must be vested in a trustee or trustees for the use and benefit of the society and its members according to their interests (e). On the death resignation or removal of any trustee or trustees such property vests in the surviving or succeeding trustee or trustees for the same interest and subject to the same

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repealed Loan Societies Act 1840 (3 & 4 Vict c 23) s 2 which is similar to the Loan Societies Act 1840 (3 & 4 Vict c 110) s 4. In the case cited the rules had been enrolled before action brought on an unstamped note given as a security for a loan but after issue of the note.

(a) Loan Societies Act 1840 (3 & 4 Vict c 110) s 7

(b) *Ibid*. As to *certiorari* see title CROWN PRACTICE Vol X p 155

(c) Loan Societies Act 1840 (3 & 4 Vict c 110) s 7. Copies are not subject to stamp duty (*ibid*).

(d) *Ibid* s 6. As to fees payable to the registrar in respect of any amendment of rules see *ibid* s 6. As to certifying amendments of rules see p 219 *ante*.

(e) Loan Societies Act 1840 (3 & 4 Vict c 110) s 8.

trusts, without assignment or conveyance (f) and for the purposes of all criminal or civil proceedings is deemed to be the property of the trustees or trustee for the time being of the society in then or his names or name without further description (g)

## SECT 1 In General

**456** A society may issue a debenture for every sum of money deposited with it otherwise than by way of gift. Legislation of the debenture in the books of the society is necessary (h)

Issue of  
debentures  
Legislation

Debentures are chargeable only on the capital and property of the society. A treasurer, trustee or other officer of a society subscribing a debenture is neither in person nor in property individually responsible for the payment of the same or any interest thereon unless in the instrument or by writing at the foot or on the back thereof he agrees to be so liable. Such declaration would apply only to the specific sum guaranteed (i)

Liability for  
payment of  
debentures

Three calendar months after the death of a debenture holder depositor or other claimant entitled to receive any sum not exceeding £50 out of the funds of a society the trustees may if satisfied that no will was made or left by the deceased and that no letters of administration of his effects have been or will be taken out pay the money in question to any person appearing to the trustees to be the person or one of the persons entitled under the Statutes of Distribution (j) to the effects of the deceased intestate. Such payment is valid and effectual against the demand of any other person claiming as next of kin so far as the funds, trustees or officers of the society are concerned. But the next of kin are not thereby debarred from recovering the money from the person to whom it has been paid (l)

Payment on  
death of  
debenture  
holder where  
no grant of  
representation  
made

**457** The trustees of a society must annually cause an abstract of the society's accounts to be made out up to the 31st December with a statement of the effects and liabilities of the society and an estimate of the clear net profit or loss up to that period. The abstract statement and estimate must be drawn up in such forms and contain such particulars as may be required by the registrar (m). A society refusing or neglecting to deliver an account is liable to a penalty of £50 recoverable in a suit by the registrar against the trustees of the society. Where judgment is obtained in such suit execution can issue only against the property of the society in the hands or under the control of the trustees and not against the trustees personally (n)

Annual  
abstract of  
accounts

(f) Loan Societies Act 1840 (3 & 4 Vict c 110) s 8

(g) *Ibid*

(h) *Ibid* s 9

(i) *Ibid* s 10. As to debentures under the Companies (Consolidation) Act 1908 (8 Edw 7 s 69) see title COMPANIES Vol V pp 345 *et seq*

(k) As to which see title DISSENT AND DISTRIBUTION Vol XI p 16

(l) Loan Societies Act 1840 (3 & 4 Vict c 110) s 11. As to dispensing with letters of administration see title EXECUTORS AND ADMINISTRATORS Vol XIV p 191

(m) Loan Societies Act 1840 (3 & 4 Vict c 110) s 27. Friendly Societies Act 1896 (59 & 60 Vict c 25) ss 2, 6 and see title FRIENDLY SOCIETIES Vol XV p 143

(n) Loan Societies Act 1840 (3 & 4 Vict c 110) s 27. As to execution generally see title EXECUTION Vol XIV pp 1 *et seq*



**SECT 1.**  
**In General**  
**Exemptions**  
**from stamp**  
**duty**

**458** Debentures issued by a society are not liable to stamp duty or parliamentary impositions (i) Similarly notes signed for the repayment of any loan made under the Act (p) receipts or entries in any book of receipt for money lent or paid, drafts and orders appointments of agents and other instruments required to be made by the Act (p) or by the rules of the society are not chargeable with stamp duty (q) A note issued after certification but prior to enrolment of the rules is exempt from stamp duty at any rate if the rules are enrolled before action brought on the note (r) A note not made in accordance with the provisions of the Act (p) requires to be stamped (s)

**SECT 2 — Loans**

**SUB SECT 1 — Granting of Loans.**

**Limit to**  
**loans**

**459** A society may not lend to any person at the same time a sum greater than £15 No second or other loan may be made to the same person until the former loan has been repaid (t)

**Applications**  
**for loans**  
**Preliminary**  
**fees**

The trustees may require from any person applying for a loan from a society payment of a sum specified in the enrolled rules not exceeding 1s 6d for the form of application and for the expenses of making inquiries into the character and solvency of the applicant and his proposed sureties Such sum is not repayable though no loan be granted The inquiries referred to must be made within fourteen days from the date of the return to the society's office of the form of application duly filled up in accordance with the rules (u)

**Inquiries as to**  
**character etc**  
**of borrower**

**All charges**  
**covered by**  
**certain**  
**payments**

The sum of 1s 6d (u) and the sum paid by way of interest (b) cover all charges which may be made by the society for the following items namely (1) cost of inquiry (c) (2) cost of execution of note (d) (3) purchase of borrower's pass book and copy of rules and all other books papers and things which he is required by the society to have and (4) the cost of all business connected with the granting of the loan (c)

(o) Loan Societies Act 1840 (3 & 4 Vict c 110) s 9

(p) Loan Societies Act 1840 (3 & 4 Vict c 110)

(q) *Ibid* s 14

(r) *Ibid*

(s) *Bradburne v Whitbread* (1843) 5 Man & G 49

(t) Loan Societies Act 1840 (3 & 4 Vict c 110) s 13 Compare the corresponding provisions for loans under the Friendly Societies Act 1896 (59 & 60 Vict c 25) s 46 see title FRIENDLY SOCIETIES Vol XV p 165 As to usurious loans by a society see *Burbidge v Cottam* (1801) 21 L J (OB) 201 *Silver v Barnes* (1839) 6 Bing (N C) 180 approved in *Cutbill v Kingdom* (1847) 1 Exch 494 504 (loan by building society)

(u) Loan Societies Act, 1840 (3 & 4 Vict c 110) s 20

(a) *Ibid*

(b) *Ibid* s 22

(c) See the text *supra*

(d) See p 223 *post*

(e) Loan Societies Act 1840 (3 & 4 Vict c 110) s 23 Any clerk officer agent or servant of a society who by any device directly or indirectly knowingly and in consideration of granting a loan obtained from a borrower or any surety payment of any other sum than was allowed by the Act, by way of charge contribution or liquor ticket or for making any inquiry giving any

A society is prohibited from receiving from any borrower any sum by way of instalment or otherwise (*f*) before the actual advancing of the loan

SECT 2  
Loans

**460** It is illegal for a society to cause applicants for loans to ballot for precedence or in any way to make the granting of any loan dependent upon chance lot or other gambling device. A society which offends against this rule forfeits all the benefit of the provisions of the Act (*j*)

Loans by  
ballot illegal

#### SUB SECT 2 — Repayment

**461** The trustees or trustee of a society are authorised at the time the loan is made to exact from every borrower discount as specified by the enrolled rules not exceeding 12 per cent per annum (*k*)

Discount

**462** The trustees may also receive repayment by instalments at the times and in manner provided by the rules but the first instalment may not be paid sooner than the eleventh day after the date of the loan (*l*). The time and manner of paying instalments must be taken into account in the calculation of the interest to be paid (*l*)

Repayment  
by instal-  
ments

A society may take a note of hand for the whole amount lent and recover upon it the amount lent or the balance remaining due immediately on failure of the payment of any instalment without being liable on that account to any of the forfeitures or penalties imposed by any statute relating to usury (*l*)

Note of hand  
for whole  
loan

No fine or penalty may be imposed by the rules of a society for any irregularity in making payment of the instalments of the loan except by requiring the balance then owing or any part of it to be paid either immediately or within such time as may be allowed by the rules (*m*)

No fines  
allowed for  
irregularity in  
paying  
instalments

**463** The instalments and rates of interest payable on any loan made by a society are regulated by the Act (*n*). Any one of the schemes in Schedule L to the Act (*n*) may be adopted and

Instalments  
and interest  
regulated by  
the Act

notice writing or sending any letter or for any other purpose rendered himself liable to the penalties of usury. This rule applied whether the overcharge was made for the benefit of the party making the overcharge or for the benefit of the society or of any other person (Loan Societies Act 1840 (3 & 4 Vict c 110) s 23). Owing to the repeal of the usury laws this provision is ineffective. See title MONEY AND MONEY LENDING.

(*f*) Except the sum of 1s 6d or less for the form of application and expenses of inquiry (Loan Societies Act 1840 (3 & 4 Vict c 110) s 21).

(*g*) *Ibid* s 24 see *h v Scott* (1811) 10 T J (MC) 10. But an unlimited mutual society registered under the Companies (Consolidation) Act 1908 (s 147 (1) c 69) the object of which is to receive subscriptions from its members and make advances to them on securities and ultimately to divide the profits is not rendered illegal under the Lottery Acts from the fact that it selects by lot the members who are to receive advances (*Ballingford v Mutual Society* (1880) 5 App Cas 680 and see title COMPANIES Vol V p 347) and see also title GAMING AND WAGERING Vol XV pp 299 *et seq*. As to bond investment companies see Assurance Companies Act 1909 (9 Edw c 49) s 34, and title COMPANIES Vol V p 633 note (*j*).

(*h*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 21.

(*i*) *Ibid*.

(*k*) *Ibid*.

(*l*) *Ibid* s 21 see title MONEY AND MONEY LENDING.

(*m*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 24.

(*n*) *Ibid* s 27 see title Sched L.

## SECT 2 Loans

when adopted must be fully and clearly set forth in the rules of the society stating the actual number of shillings and pence taken by way of interest for every loan (o)

Rules contain-  
ing scheme  
not set  
forth in the  
Act

Rules which contain a scheme differing from all the schemes in Schedule I may not be certified by the registrar (p) until a certificate has been obtained from the actuary to the National Debt Office to the effect that the rate of interest proposed to be taken including therein all charges except the sum of 1s 6d for the form of application and expenses of inquiry is not greater than is allowed by the Act (q)

Entries to be  
made in  
borrower's  
pass book

**464** It must be expressly stated in the enrolled rules of every society that an entry must be made in the borrower's pass book of every payment made to the society by the borrower including the payment made for inquiries. Entries must be made in accordance with the rule (r)

Notes for  
repayment of  
loans

**465** Notes for the repayment of loans signed by borrowers or sureties must be made payable to the treasurer for the time being of the society (s) and any society may add to or embody in such note the allegations made by the parties respecting their property such allegations if made under the hand of a party being admissible in evidence against him in any proceedings under the Act (t)

Securities not  
transferable

**466** Notes of hand bills or other securities for the payment of money taken by a society are not transferable by indorsement or otherwise nor may they be sued upon except by the treasurer or trustees of the society to which they have been made (u)

Summary  
jurisdiction  
Procedure

**467** If the borrower fails to repay the loan or any part of it after a proper demand in writing has been made by the treasurer of the society he may be summoned before a justice of the peace and ordered to pay the sum for which he is liable with costs not exceeding 5s (a). This summary jurisdiction is apparently restricted to authorised advances (b). An unauthorised loan is not necessarily illegal or irrecoverable though there may be some difficulty if the note is unstamped. But such a loan is not recoverable in a court of summary jurisdiction (c).

(o) Loan Societies Act 1840 (3 & 4 Vict c 110) s 22 see *ibid* Sched I

(p) As to such certifying see p 219 *ante*

(q) Loan Societies Act 1840 (3 & 4 Vict c 110) s 22. The charge for the actuary's certificate is one guinea (*ibid*)

(r) *Ibid* s 2

(s) *Ibid* s 11. Form of note which is optional see *ibid* Sched A

(t) *Ibid* s 16

(u) *ibid* s 10. The Land Transfers Acts 1891 (54 & 55 Vict c 4) (see *ibid* s 3) and 1892 (55 & 56 Vict c 36) which enable companies to make compensation for losses arising from forced transfers apply to loan societies incorporated by or in pursuance of any Act of Parliament as if the society were a company.

(a) Loan Societies Act 1840 (3 & 4 Vict c 110) s 16. Form of complaint see *ibid* Sched I. As to jurisdiction see *Auer* (1911) 131 I T Jo 342 (magistrate's decision).

(c) See *Finnshtilen Loan Fund Society (Treasurer) v Green* [1898] 2 I R 103 11 113.

(d) *Ibid* at p 113 114. See also *Re Coltman* (Coltman v Coltman (1881) 19 Qb 1) (4 C A) (*undile Bricks Ltd v Blackburn Benefit Society* (1884) 9 App Cas 811) *Moss v Donagher* [1903] 2 I R 290, 300.

The treasurer or clerk in office at the date of the commencement of proceedings is the proper person to take such proceedings to recover the amount payable under a promissory note to the treasurer for the time being of such society. The person who was treasurer at the date of the note but has since ceased to hold office cannot take proceedings (*d*)

SECT 2  
Loans

If the society thinks fit the sureties or any one of them in the absence of any provision to the contrary in the rules may be sued in preference to the actual borrower (*e*). A surety cannot escape liability on the plea that there has been a deviation from the rules in the management of the society unless it be of such a nature as to affect the particular contract with him (*f*).

Sureties may  
be sued

Payment of the amount adjudged due with costs may be enforced by an order for distress and sale of the goods of the party neglecting to pay (*g*). No such proceedings are removable by *certiorari* into any of the superior courts of record (*h*).

Distress

*Certiorari*

**468** The treasurer or clerk of a society may also take proceedings in any county court for the recovery of the sum due against the party or parties liable to pay (*i*). If the sum appearing to be due exceeds the amount within the jurisdiction of the court and the treasurer or clerk declares his willingness to accept such sum as the court is enabled to adjudge an order may be made for the payment of the latter sum in which event no further proceedings can be taken elsewhere to recover the balance of the debt (*k*).

Proceedings  
in the county  
court

**469** In the case of a society whose rules have been duly certified proceedings may be taken for the recovery of any loan by the treasurer or clerk for the time being (*l*).

Proceedings in  
superior  
courts

It seems that the trustees of a society also can sue at common law for the recovery of a loan there being no express words in the Act (*m*) ousting the jurisdiction of the superior courts (*n*).

Where a promissory note is given by two named individuals to

(*d*) *Limms v Williams* (1842) 3 Q. B. 41 a case decided on the Loan Societies Act 1833 (5 & 6 Will. 4 c. 23) s. 5. Under that Act recovery of statutory loans was by summary jurisdiction only. As to procedure in the county court see the text *infra*.

(*e*) Loan Societies Act 1840 (3 & 4 Vict. c. 110) s. 16. See *Proun v Jangley* (1842) 4 Man. & G. 466.

(*f*) *Green v Gooden* (1841) 3 Man. & G. 416.

(*g*) Loan Societies Act 1840 (3 & 4 Vict. c. 110) s. 16. For form of distress warrant see *ibid* Sched. C. As to distress generally see title DISTRESS Vol. XI pp. 115 *et seq*.

(*h*) Loan Societies Act 1840 (3 & 4 Vict. c. 110) s. 16. As to *certiorari* see title CROWN PRACTICE Vol. X p. 100.

(*i*) *Ibid* s. 17. See title COUNTY COURTS Vol. VIII p. 666.

(*k*) Loan Societies Act 1840 (3 & 4 Vict. c. 110) s. 18.

(*l*) *Ibid* s. 19 compare *Addley v Woolley* (1819) 8 Tr. 691. The contrary was decided in a case under the Loan Societies Act 1833 (5 & 6 Will. 4 c. 23) which contained no such provision (*Limms v Williams supra* see *Enniskillen Loan Fund Society (Treasurer) v Green* [1898] 2 I. R. 103 119).

(*m*) Loan Societies Act 1840 (3 & 4 Vict. c. 110).

(*n*) *Albon v Pyke* (1842) 4 Man. & G. 421. See also *Limms v Williams supra* where the point was raised but left undecided.

SECT 7  
Loans

secured in advance by a society which is not enrolled it is unnecessary to join all the members as plaintiffs in any proceedings taken on the note (o)

Defendants

**470** Proceedings to recover the amount secured by a promissory note given to a society may be taken against the personal representative of a deceased borrower (p)

The language of a bond given to a society is strictly construed (q)

## Part III—Winding Up

Winding up

**471** The Act (r) contains no provisions relating to the winding up of loan societies. A loan society which consists of more than seven members at the date of the winding up petition (s) may be wound up as an unregistered association under the Companies (Consolidation) Act 1908 (t). Where the court orders a loan society certified under the Act (r) to be wound up as an unregistered company the order may direct the proceedings to be transferred to the county court (u).

Set off

Where a loan society is being wound up as an unregistered company a member cannot set off an amount deposited by him with the society against an amount borrowed by him from the society on a bond which is being sued upon by the official liquidator. This rule applies even where the borrower has given due notice of withdrawal and the society has failed to meet its obligations (a).

(c) *Baudet v Howell* (1841) 4 Scott (N R) 331 *per* MAULE J at p 334. Policies of insurance are usually signed by three directors and who ever it is suggested that the whole society must sue or be sued?

(r) *Atthill v Woods* [1903] 2 I R 30. *R (O'Leary) v Firmanagh Tuques* [1904] 2 I R 18 (A).

(q) *Three Lowns Irish Mutual Deposit and Loan Society Ltd v Doyle* (1862) 13 C L (N S) 290. In this case a borrower gave a bond to a loan society to secure a loan repayable by monthly instalments the condition being that on failure to pay any instalment the borrower should pay one shilling in the pound for each and every pound of the instalment left unpaid and the society was held not entitled to anything in respect of fractional parts of a pound unpaid.

(r) Loan Societies Act 1840 ( & 4 Vict c 110).

(s) *Re Milton Benefit Loan Society Coy v Booth* (1849) 12 Ch D 619.

(t) 6 Edw 7 c 69 ss 26—269 replacing the Companies Act 1862 (2, & 26 Vict c 89) ss 199—200. See *Re Sherwood Loan Company Ex parte Smith* (1881) 1 Sim (N S) 163. *Re Crown and Cushion Loan and Society* (1850) 11 Jur 574. *Thelluson v Hale* (1880) 43 L T 508 and titles COMPANIES Vol V pp 647—654. FRIENDLY SOCIETIES Vol XV p 202. INDUSTRIAL PROVIDENT AND SIMILAR SOCIETIES Vol XVII p 34 and the following cases relating to the winding up of loan societies under statutes which apply only to Ireland but which are to some extent similar in principle namely *Independent Protestant Loan Fund Society Ex parte Morton Friendly Protestant Partnership Loan Fund Co Ex parte Hall* [1895] 1 I R 1. *Re Irish Mercantile Loan Society* [1901] 1 I R 98. *Re Belfast Tailors Co partnership Ltd* [1909] 1 I R 49.

(u) *Phillipson v Hale supra*.

(a) *Ibid*.

To enable the court to wind up a loan society consisting of less than seven members at the date of the petition an action for dissolution of partnership is the correct procedure (b)

PART III  
Winding Up

Dissolution as  
in partner  
ship

(b) *Re Bolton Benefit Loan Society Coop v Both* (1849) 12 Ch D 679 1 or  
the procedure on dissolution of partnership see title PARTNERSHIP

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See CORPORATIONS EDUCATION ELECTIONS LOCAL GOVERNMENT  
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Boundaries and Leases*

FACTORIES AND SHOPS  
BOUNDARIES FENCES AND PARTY  
WALLS

*Bread*

FACTORIES AND SHOPS FOOD  
AND DRUGS

*Bridges - -*

HIGHWAYS STREETS AND  
BRIDGES

*Building Societies  
Burial*

BUILDING SOCIETIES  
BURIAL AND CREMATION

*Byelaws - -*

COMPANIES OPEN SPACES AND  
RECREATION GROUNDS PUBLIC  
HEALTH AND LOCAL ADMINIS  
TRATION RAILWAYS AND  
CANALS

*Cabs - -*

STREET AND AERIAL TRAFFIC  
RAILWAYS AND CANALS

*Canals  
Cattle  
Cemeteries*

ANIMALS  
BURIAL AND CREMATION

*Charities*

CHARITIES

*Clubs*

CLUBS

*Colleges*

CHARITIES EDUCATION

*Commons*

COMMONS AND RIGHTS OF  
COMMON

*Compulsory Purchase*

COMPULSORY PURCHASE OF LAND  
AND COMPENSATION

*Constables -*

CONSTITUTIONAL LAW CRIMINAL  
LAW AND PROCEDURE METRO  
POLIS POLICE SHERIFFS AND  
BAILIFFS

*Coroners -*

CORONERS

*Corrupt and Illegal Practices -*

ELECTIONS

*County Gaol - -*

PRISONS

*Crementation - -*

BURIAL AND CREMATION

|                                   |                              |
|-----------------------------------|------------------------------|
| <i>For Cowsheds and Dairies</i>   | <i>See title</i> ANIMALS     |
|                                   | FOOD AND DRUGS               |
|                                   | PUBLIC HEALTH AND LOCAL      |
|                                   | ADMINISTRATION               |
| <i>Dancing</i>                    | THEATRES AND OTHER PLACES OF |
|                                   | ENTERTAINMENT                |
| <i>Disease</i>                    | ANIMALS PUBLIC HEALTH AND    |
|                                   | LOCAL ADMINISTRATION         |
| <i>Disorderly Houses</i>          | CRIMINAL LAW AND PRO         |
|                                   | CEDURE                       |
| <i>Docks -</i>                    | RAILWAYS AND CANALS SHIPPING |
|                                   | AND NAVIGATION WATERWAYS     |
|                                   | AND WATERCOURSES             |
| <i>Drainage</i>                   | PUBLIC HEALTH AND LOCAL      |
|                                   | ADMINISTRATION SEWERS AND    |
|                                   | DRAINS                       |
| <i>Education</i>                  | EDUCATION                    |
| <i>Election</i>                   | ELECTIONS                    |
| <i>Electric Lighting</i>          | ELECTRIC LIGHTING AND        |
|                                   | POWER                        |
| <i>Executive Government</i>       | CONSTITUTIONAL LAW           |
| <i>Explosives</i>                 | EXPLOSIVES                   |
| <i>Fairs</i>                      | MARKETS AND FAIRS            |
| <i>Fences -</i>                   | BOUNDARIES FENCES AND PARTY  |
|                                   | WALLS                        |
| <i>Ferries</i>                    | FERRIES                      |
| <i>Food and Drugs</i>             | FOOD AND DRUGS               |
| <i>Game</i>                       | GAME                         |
| <i>Goals and Goals</i>            | PRISONS                      |
| <i>Gas</i>                        | GAS                          |
| <i>Hackney Carriages</i>          | STREET AND AERIAL TRAFFIC    |
| <i>Harbours</i>                   | SHIPPING AND NAVIGATION      |
|                                   | WATERS AND WATERCOURSES      |
| <i>Health</i>                     | PUBLIC HEALTH AND LOCAL      |
|                                   | ADMINISTRATION               |
| <i>Highways</i>                   | HIGHWAYS STREETS AND         |
|                                   | BRIDGES                      |
| <i>Hospitals</i>                  | CHARITIES EDUCATION AND      |
|                                   | PERSONS OF UNSOUND MIND      |
|                                   | PUBLIC HEALTH AND LOCAL      |
|                                   | ADMINISTRATION               |
| <i>Houses -</i>                   | INNS AND INNKEEPERS          |
| <i>Housing of Working Classes</i> | COMPULSORY PURCHASE OF LAND  |
|                                   | AND COMPENSATION PUBLIC      |
|                                   | HEALTH AND LOCAL ADMINIS     |
|                                   | TRATION                      |
| <i>Inclosures</i>                 | COPYHOIDS COMMONS AND        |
|                                   | RICHES OF COMMON HIGH        |
|                                   | WAYS STREETS AND BRIDGES     |
|                                   | OPEN SPACES AND RECREATION   |
|                                   | GROUND                       |
| <i>Industrial Schools</i>         | EDUCATION                    |
| <i>Inebriates</i>                 | INTOXICATING LIQUORS         |
| <i>Infant Life Protection</i>     | FACTORIES AND SHOPS INFANTS  |
|                                   | AND CHILDREN                 |

|   |  |
|---|--|
| <i>as Infectious Diseases</i>                 | <i>See title</i> ANIMAL PUBLIC HEALTH AND<br>LOCAL ADMINISTRATION                |
| <i>Inns and Innkeepers</i>                    | INNS AND INNKEEPERS  |
| <i>Intoxicating Liquors</i>                   | INTOXICATING LIQUORS   |
| <i>Joint Burial Places</i>                    | BURIAL AND CREMATION   |
| <i>Justices of the Peace</i>                  | CRIMINAL LAW AND PROCEDURE<br>MAGISTRATES  |
| <i>Libraries</i>                              | LITERARY AND SCIENTIFIC INSTITUTIONS PUBLIC HEALTH AND<br>LOCAL ADMINISTRATION   |
| <i>Leasehold</i>                              | EASEMENTS AND PROFITS A<br>PRENDRE   |
| <i>Light Railways</i>                         | TRAMWAYS AND LIGHT RAILWAYS  |
| <i>Locomotives</i>                            | RAILWAYS AND CANALS STREET<br>AND AERIAL TRAFFIC TRAM<br>WAYS AND LIGHT RAILWAYS |
| <i>Lodging Houses</i>                         | LANDLORD AND TENANT PUBLIC<br>HEALTH AND LOCAL ADMINIS-<br>TRATION               |
| <i>London</i>                                 | METROPOLIS   |
| <i>Lunacy Commissioners</i>                   | LUNATICS AND PERSONS OF UN-<br>SOUND MIND  |
| <i>Magistrates</i>                            | MAGISTRATES  |
| <i>Main Roads</i>                             | HIGHWAYS STREETS AND<br>BRIDGES  |
| <i>Metropolis</i>                             | METROPOLIS   |
| <i>Motor Cars</i>                             | STREET AND AERIAL TRAFFIC  |
| <i>Music Halls</i>                            | THEATRES AND OTHER PLACE OF<br>ENTERTAINMENT                                     |
| <i>Nuisance</i>                               | NUISANCE   |
| <i>Omnibuses</i>                              | STREET AND AERIAL TRAFFIC  |
| <i>Open Spaces and Recreation<br/>Grounds</i> | OPEN SPACES AND RECREATION<br>GROUNDS  |
| <i>Parls</i>                                  | CONSTITUTIONAL LAW OPEN<br>SPACES AND RECREATION<br>GROUNDS                      |
| <i>Pawnbrokers</i>                            | LAWNS AND PLEDGES  |
| <i>Ports</i>                                  | SHIPPING AND NAVIGATION<br>WATERS AND WATERCOURSES                               |
| <i>Provisions</i>                             | AGRICULTURE FOOD AND DRUG<br>MEDICINE AND PHARMACY<br>SALE OF GOODS              |
| <i>Police</i>                                 | POLICE   |
| <i>Poor Law</i>                               | POOR LAW   |
| <i>Public Authorities &amp; Protection</i>    | PUBLIC AUTHORITIES AND PUBLIC<br>OFFICERS  |
| <i>Public Health</i>                          | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |
| <i>Public Libraries</i>                       | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |
| <i>Quarantine</i>                             | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |

|                                   |  |
|-----------------------------------|--|
| <i>For Railways</i>               | <i>See title</i> RAILWAYS AND CANALS   |
| <i>Rates and Rating</i>           | RATES AND RATING   |
| <i>Refreshment Houses</i>         | INNS AND INNKEEPERS INTOXI-<br>CATING LIQUORS SALE OF<br>GOODS TRADE AND TRADE<br>UNIONS |
| <i>Roads</i>                      | HIGHWAYS SIDEWAYS AND<br>BRIDGES   |
| <i>Sanitation</i>                 | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |
| <i>Scavengers</i>                 | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |
| <i>Sewers and Drains</i>          | SEWERS AND DRAINS  |
| <i>Shop Hours -</i>               | FACTORIES AND SHOPS  |
| <i>Slaughter Houses</i>           | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |
| <i>Street Railways</i>            | TRAMWAYS AND LIGHT RAILWAYS  |
| <i>Street Traffic</i>             | SHIPPING AND AERIAL TRAFFIC  |
| <i>Streets</i>                    | HIGHWAYS SIDEWAYS AND<br>BRIDGES   |
| <i>Telegraphs and Telephones</i>  | TELEGRAPHS AND TELEPHONES  |
| <i>Theatres -</i>                 | THEATRES AND OTHER PLACES OF<br>ENTERTAINMENT  |
| <i>Trades</i>                     | ANIMALS FOOD AND DRUGS<br>INTOXICATING LIQUORS TRADE<br>AND TRADE UNIONS                 |
| <i>Tramways -</i>                 | TRAMWAYS AND LIGHT RAILWAYS  |
| <i>Veterinary Surgeons</i>        | ANIMALS MEDICINE AND PHAR-<br>MACY   |
| <i>Water Supply</i>               | WATER SUPPLY   |
| <i>Ways -</i>                     | EASEMENTS AND PROFITS A<br>PENDRE HIGHWAY PROFITS<br>AND BRIDGES                         |
| <i>Working Classes Housing of</i> | PUBLIC HEALTH AND LOCAL<br>ADMINISTRATION  |
| <i>Workshops -</i>                | FACTORIES AND SHOPS  |

## Part I—Local Government Areas and their Means of Government<sup>(a)</sup>

### SECT 1—*The Parish*

#### SUB SECT 1—*In General*

Meaning of  
'parish'

**472** The parish (b) is the unit of area for local government purposes It is a place for which a separate poor rate is or can be

(a) For local government in London see title METROPOLIS In addition to the areas detailed in the text there are some minor areas comprised in the larger areas mentioned which have been created for certain limited purposes such as the areas of Commissioners of Sewers (see titles COURTS, Vol IX p 220 SEWERS AND DRAINS) and drainage districts (see title SEWERS AND DRAINS) and the port sanitary district (see p 292 *post* and titles METROPOLIS PUBLIC HEALTH AND LOCAL ADMINISTRATION) For poor law unions see title POOR LAW As to the union of local authorities for the purpose of providing for the reception and care of lunatics see title LUNATICS AND PERSONS OF UNSOUND MIND p 484, *post*

(b) In addition to the civil parish which alone is treated above, there are the

## PART I —LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

made, or for which a separate overseer is or can be appointed (c), and every portion of England and Wales is in some parish (d)

SECT 1  
The Parish.  
Organisation

**473** The civil affairs of a rural parish are vested in the parish council or parish meeting urban parishes possess neither parish councils nor parish meetings and such civil powers as have not been transferred to the urban council are still exercised by the vestry, which, in rural parishes, practically has now no civil jurisdiction (e)

**474** Apart from statutory adjustments (f) including the right of the county council to alter and define parochial boundaries (g) the boundaries of the parish depend on ancient and immemorial custom (h) evidenced and perpetuated in many parts of the county by periodical perambulations in Rotation Week (i)

Boundaries

### SUB SECT 2 —Division and Union of Parishes

#### (1) Division

**475** Parishes may be divided (1) to prevent their being partly situated in more than one county or sanitary district (2) to secure more efficient administration and (3) for election purposes

Purposes of Division

Burial Act parish (see title BURIAL AND CREMATION Vol III p 448) the ecclesiastical parish (see title ECCLESIASTICAL LAW Vol XI p 442) the highway parish (see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 83) and the land tax parish (see title LAND TAX Vol XVIII p 306 note (a))

(c) This is the meaning in which unless a contrary intention appears the expression is used in all statutes passed after the year 1866 (Interpretation Act 1889 (52 & 53 Vict c 63) s 5) For similar definitions see the Public Health Act 1875 (38 & 39 Vict c 55) s 4 Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict c 26) s 4 Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7 (1) Local Government Act 1888 (51 & 52 Vict c 41) s 100 Local Government Act 1894 (56 & 57 Vict c 72) s 70 (1)

(d) All places which were formerly extra parochial have been absorbed in some parish See the Land Drainage (Rating) Act 1813 (17 Geo 2 c 31) ss 1 2 Extra Parochial Places Act 1857 (20 Vict c 19) ss 1—8 11 Poor Law Amendment Act 1866 (31 & 32 Vict c 122) s 21

(e) See p 261 *post*

(f) As to the power of Inclosure Commissioners (now the Board of Agriculture and Fisheries) to ascertain and fix the boundaries of parishes which are doubtful see title COMMONS AND RIGHTS OF COMMON Vol IV p 502 and as to the like power of the Tithe Commissioners (now the Board of Agriculture and Fisheries) see title ECCLESIASTICAL LAW Vol XI p 441 note (a)

(g) See Local Government Act, 1888 (51 & 52 Vict c 41) s 57 Local Government Act, 1894 (56 & 57 Vict c 72) s 36 (8) and pp 323 371 *post*

(h) Burn's Ecclesiastical Law tit Parish As to the alteration of parishes owing to the encroachment or receding of tidal waters see title WAJERS AND WATERCOURSES and the following cases —*R v Musson* (1808) 8 L & B 900 *R v Gee* (1859) 1 E & L 1065 *Ipswich Dock Commissioners v St Peter Ipswich Overseers* (1866) 7 B & S 310 *Bridgwater Trustees v Boodle cum Linacre* (1866) L R 2 Q B 4 *Blackpool Pier Co Ltd v Fylde Union (Assessment Committee)* (1877) 41 J P 344 the Poor Law Amendment Act 1868 (31 & 32 Vict c 122) s 27 and see also titles BOUNDARIES FENCES AND PARTY WALLS Vol III pp 112 113 141 EVIDENCE Vol XIII p 479

(i) As to perambulations see titles BOUNDARIES FENCES AND PARTY WALLS Vol III p 148 CUSTOM AND USAGES Vol X, p 245 A custom to enter houses during perambulation does not include a right to buy refreshments from such houses (Burn's Ecclesiastical Law 9th ed tit Parish 75 *Welby v Harbert* (1676) 3 Keb 609) The expenses may be paid out of the



## SECT 1

**The Parish**

Division  
by the Local  
Government  
Board.

The division may be made directly by statute, or by the order of a local or other authority under statutory powers (j)

**476** The Local Government Board (k) may by an order under seal, confirmed by Parliament divide parishes which require division for the better administration of the poor laws (l)

Parishes may also be divided by the Local Government Board under the powers transferred to it from county councils when the latter bodies have not exercised them within the limited time (m) subject to the holding of the necessary inquiries and the giving of the necessary notices (n), including notices to the parish council or parish meeting (o)

Division  
by county  
councils

**477** Parishes may be divided by county councils either generally under the powers conferred by the statute which created such councils (p) or for the purpose of giving effect to the Local Government Act 1894 (q) in which case the power is also exercised under the former statute (r)

Division into  
wards

County councils may by order divide parishes into wards, called parish wards for the purpose of the election of parish councillors and may assign the boundaries and the number of councillors for each ward (s)

(n) *Union*

Method.

**478** Parishes may be united by the Local Government Board (t),

poor rate if not made oftener than once in three years (Poor Law Act 1844 (i & 8 Vict c 101) s 60)

(j) As to the divisions which took place consequent upon the Local Government Act, 1894 (56 & 57 Vict c 73) see *ibid* ss 1 36 69 As to the form of order see p 239 *post*

(k) For the constitution of the Local Government Board see title CONSTITUTIONAL LAW Vol VII p 103

(l) Poor Law Amendment Act 1861 (30 & 31 Vict c 106) s 3 The powers of the Local Government Board under this or any other statute in respect of the union division or alteration of parishes are not affected by the powers given to the county council for similar purposes (Local Government Act 1888 (51 & 52 Vict c 41) s 57 (1))

(m) See the Local Government Act 1894 (56 & 57 Vict c 73) s 56 The limit of two years imposed by *ibid* s 33b was repealed by the Statute Law Revision Act 1908 (8 Edw 7 c 49) The powers of the county council under the Local Government Act 1888 (51 & 52 Vict c 41) s 57 and under the Local Government Act 1894 (56 & 57 Vict c 73) s 36 (10) as to the division of parishes remain unaffected As to these see pp 323 377 *post*

(n) Local Government Act 1888 (51 & 52 Vict c 41) s 57

(o) Local Government Act 1894 (56 & 57 Vict c 73) s 36 (1) (7) (8) (13)

(p) Local Government Act 1888 (51 & 52 Vict c 41) s 57 see p 317 *post*

(q) 56 & 57 Vict c 73.

(r) *Ibid* s 36 (8)

(s) *Ibid* s 18 (1) The order may be revoked or varied (*ibid* s 15 (3)) For the circumstances to be considered in making the order see *ibid* s 18 (2) A separate election is held for each ward (*ibid* s 18 (4))

(t) See the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict c 61) ss 1—9 Poor Law Act 1879 (42 & 43 Vict c 54) ss 4—7 Divided Parishes and Poor Law Amendment Act 1882 (45 & 46 Vict c 58) s 4 The powers under these Acts have been largely superseded in practice by those conferred upon county councils under the Local Government Acts 1888 (51 & 52 Vict c 41) and 1894 (56 & 57 Vict c 73) (see p 377, *post*), but the former

## PART I — LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

or by the county council, which has also power to transfer a part of one parish to another (*u*)

SECT. I.  
The Parish

**479** Where any parish is divided or united with another parish by an order (*a*), the order must specify the name which the new parish is to bear (*b*). The change of name must be notified to the Local Government Board (*c*) and to the Board of Agriculture and Fisheries (*d*). It does not affect legal proceedings nor the rights and obligations of the parish (*e*).

Requirements  
on union or  
division

### SUB SECT. 3 — Organisation

#### (1) Rural Areas

**480** Every parish in a rural sanitary district is a rural parish (*f*) and has a parish meeting (*g*) and if its population is or exceeds 300 a parish council also (*h*).

Parish  
meetings and  
councils

**481** The parish meeting of a rural parish with a population of at least 100 may resolve to have a parish council and the county council must thereupon make an order which need not be submitted to or confirmed by the Local Government Board (*i*) establishing the parish council (*j*). In the case of a parish with a population less than 100 the county council may, with the consent of the parish meeting, establish a parish council in the parish (*l*).

Creation of  
parish council  
by order

**482** The parish meeting of a parish whose population has increased so much as to justify the election of a parish council may petition the county council and the latter may by a similar order direct the election of a parish council. If the parish has previously been grouped with other parishes (*m*) the order must provide for the separation of the parish from the group for the alteration of the parish council of the group and for the adjustment of property rights and liabilities as between the group and the separated parish (*n*).

Petition for  
parish council

powers still exist (see the Local Government Act 1888 (*o*1 & 52 Vict. c. 41) s. 57 (7)). As to the power of readjustment of portions of a parish for poor law administration see the Poor Law Amendment Act 1867 (*o*0 & 31 Vict. c. 106).

s. 3 title POOR LAW

(*u*) See p. 377 *post*

(*a*) Under the Local Government Act 1894 (*o*6 & *o*1 Vict. c. 73)

(*b*) *Ibid.* s. 50 (1) (2)

(*c*) *Ibid.* s. 55 (4)

(*d*) *Ibid.* s. 71

(*e*) *Ibid.* s. 55 (5). As to the transfer of stock standing in the original name of the parish see Local Government (Stock Transfer) Act 1890 (*o*6 & *o*9 Vict. c. 32) s. 1.

(*f*) Local Government Act 1894 (*o*6 & 57 Vict. c. 73) s. 1 (2)

(*g*) *Ibid.* s. 1 (1). As to the effect in 1894 of a rural parish being so extensive with a rural sanitary district see *ibid.* s. 36 (4).

(*h*) *Ibid.* s. 1 (1)

(*i*) *Ibid.* s. 40

(*k*) *Ibid.* s. 1 (1) (*a*)

(*l*) *Ibid.* A parish with a population of less than 200 may apply to the county council for a parish council (*ibid.* s. 35 (4)).

(*m*) See p. 240 *post*

(*n*) Local Government Act 1894 (*o*6 & *o*1 Vict. c. 73) ss. 39 (1) 40. This

## SECT 1

## The Parish.

Dissolution of  
parish council

**483** Where the population of a rural parish has fallen below 200 according to the current census the parish meeting may petition the county council, and the latter may by a similar order dissolve the parish council making by the order all necessary provisions for carrying it into effect and for disposing of and adjusting the property rights and liabilities of the dissolved council (*o*)

A rejected petition may not be renewed within two years from the previous presentation (*p*)

Grouping of  
parishes

**484** A parish may upon the application of a parish meeting be grouped with another or others under a common parish council by an order (*q*) of the county council. The consent of the parish meeting of each parish is necessary and every parish grouped must have its own parish meeting (*r*). The grouped parishes must be within the same administrative and county district unless the county council for special reasons otherwise directs (*s*)

Dissolution of  
group

The county council may by order dissolve the group upon the application of the council for the group or of the parish meeting of any of the grouped parishes (*t*)

## (u) Urban Areas

**485** The vestry exercises civil functions save where they have been transferred to the borough or urban council (*u*)

SUB SECT 4 — *The Parish Council*

## (1) Constitution

The body  
corporate

**486** The parish council is a body corporate (*a*) consisting of a chairman (*b*) and of such number of councillors not being less than five nor more than fifteen as the county council may from time to time fix (*c*). It is styled the Parish Council of ——. Doubts as to the name are settled by the county council after consultation with the parish meeting (*d*)

## Style

## Nature

It has perpetual succession and may hold land for the purpose of

order is to be deemed to be an order under the Local Government Act 1888 s 51 & 52 Vict c 41) s 51 (Local Government Act 1894 (56 & 57 Vict c 13) s 36 (10)). As to the effect of this, see note (*h*) p 37, *post*

(*o*) Local Government Act 1894 (56 & 57 Vict c 73) ss 39 (2) 40

(*p*) *Ibid*

(*q*) As to the order see *ibid* ss 38 40 50 71

(*r*) *Ibid* s 1 (1) (*b*). The order is deemed to be one under the Local Government Act 1888 (51 & 52 Vict c 41) s 57 (Local Government Act, 1894 (56 & 57 Vict c 73) s 36 (10)). As to the effect of this see note (*h*) p 377 *post*

(*s*) Local Government Act 1894 (56 & 57 Vict c 73) s 38 (2)

(*t*) *Ibid* s 38 (5)

(*u*) See p 261 *post*

(*a*) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (9)

(*b*) For the election of the chairman see p 241 *post* and title ELECTIONS, Vol XII p 389

(*c*) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (1)

(*d*) *Ibid* s 3 (9). As to a transfer of stock standing in the name of the council when the name is changed see Local Government (Stock Transfer) Act, 1895 (58 & 59 Vict c 32) s 1

its powers and duties without licence in mortmain (e) It signifies its acts by an instrument executed at a meeting of the council, and under the hands and seals, when necessary of the chairman presiding at the meeting of the council and two other members (f)

SECT 1  
The Parish.

If at any time the parish council is unable to act owing to a want of councillors whether from failure to elect or otherwise the county council may order a new election and may also make provision by order for any person to act in the meantime in the place of the parish council or of the chairman (g)

**487** In legal proceedings the council appears by the clerk or an authorised officer or member who may institute and carry on any proceeding which the council may (h) Legal proceedings

**488** The chairman is elected at the annual meeting (i) He may resign by giving notice in writing to the council (j) A retiring chairman is eligible for re election (l) The disqualifications for being elected or being a chairman are the same as in the case of district councillors (l) Chairman

A casual vacancy in the office of chairman is filled by the parish council (m)

A vice chairman may be appointed who, in the absence or inability of the chairman, has the latter's powers and authority (n)

**489** The parish councillors are elected from among the parochial electors (o) of the parish or persons who have during the whole of the twelve months preceding the election resided in the parish, or within three miles thereof (p) or who have entered into residence on or before the 25th March in any year if otherwise qualified for election (q) Sex and marriage do not disqualify (r) Parish councillors  
Qualification

The disqualifications for being elected or being a parish councillor are the same as in the case of district councillors (s) except that when a person is a parish councillor or is a candidate for such office and is concerned in any such bargain or contract, or participates in such profit as would be a disqualification the county council has power to remove such disqualification if it thinks that its removal would be beneficial to the parish (t) Disqualification

(e) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (9) The parish council has no corporate seal

(f) *Ibid* s 3 (9)

(g) *Ibid* s 47 (5)

(h) *Ibid* s 3 (10) Sched I Part 2 (16)

(i) See title ELECTIONS Vol XII p 389

(j) Local Government Act 1894 (56 & 57 Vict c 73) s 47 (3)

(k) *Ibid* s 47 (2)

(l) *Ibid* s 46 as to which see p 264 post

(m) Local Government Act 1894 (56 & 57 Vict c 73) s 47 (4)

(n) *Ibid* s 3 (10) Sched I Part 2 (11)

(o) As to parochial electors see title ELECTIONS Vol XII p 191

(p) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (1)

(q) Local Government Act 1897 (60 Vict c 1) s 1

(r) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (2)

(s) *Ibid* s 46 see p 264 post

(t) Local Government Act 1894 (56 & 57 Vict c 73) s 46 (3) As to disqualifications generally see p 264 post

SECT 1  
The Parish

Proceedings of the council are not invalidated by any defect in the qualification of any of its members (*u*)

A retiring parish councillor is eligible for re election (*x*)

Election

**490** The election is made by the parochial electors (*b*) Candidates may use school houses and the like buildings for their meetings (*c*)

Acceptance of office

Acceptance of office is signified by signing a declaration in the presence of a member of the council Failing this the office is void (*d*) but there is no penalty for non acceptance

Term of office

**491** Parish councillors hold office for three years and go out of office on the 15th April in every third year computed from 1901 (*e*)

Resignation

A parish councillor may resign office by giving notice in writing to the chairman (*f*) and vacates office by becoming disqualified or absenting himself from meetings for six months without proper excuse (*g*)

If at the ordinary election any vacancies are not filled by election such retiring councillors as are not re elected and are necessary to fill the vacancies are if willing to hold office (*h*) The councillors so to continue are to be those who were highest on the poll at the previous election or if their numbers were equal or there was no poll, then those who are nominated by the parish meeting or failing that by the chairman of the parish council (*i*)

Casual vacancies

**492** Casual vacancies are filled by the parish council (*l*) and for this purpose a meeting of the council must be forthwith convened (*l*) but proceedings are not invalidated by any vacancy (*m*) The person so elected retires from office when the person whose place he takes would have retired (*n*)

(11) Finance

Expenses

**493** The expenses of a parish council and of a parish meeting (*o*) including the expenses of a poll are speaking generally to be paid

(*u*) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (10) Sched I Part 2 (12)

(*a*) *Ibid* s 47 (2)

(*b*) See title ELECTIONS Vol XII pp 191-35. There must be a separate election for each ward (Local Government Act 1894 (56 & 57 Vict c 73) s 18 (4))

(*c*) *Ibid* s 4

(*d*) *Ibid* s 3 (10) Sched I Part 2 (1) It should be at the first meeting, but the council may at that meeting postpone it (*ibid*)

(*e*) Parish Councillors (Tenure of Office) Act 1899 (62 & 63 Vict c 10) s 1 (1) (2) (3) repealing Local Government Act 1894 (56 & 57 Vict c 73) s 3 (3) (4) as from 1st January 1900

(*f*) Local Government Act 1894 (56 & 57 Vict c 73) s 47 (3)

(*g*) *Ibid* s 46 (6) (7) These provisions are the same as in the case of urban district councillors as to which see p 260 *post*

(*h*) Local Government Act 1894 (56 & 57 Vict c 73) s 47 as amended by the Parish Councillors (Tenure of Office) Act 1899 (62 & 63 Vict c 10) s 1 (4)

(*i*) Local Government Act 1894 (56 & 57 Vict c 73) s 41 (1)

(*l*) *Ibid* s 47 (4)

(*l*) *Ibid* s 3 (10) Sched I Part 2 (1)

(*m*) *Ibid* Sched I Part (12)

(*n*) *Ibid* s 47 (4)

(*o*) In this case the parish council when it exists, pays the expenses (Local

out of the poor rate (*p*) and for the purpose of obtaining payment the parish council (*q*) issues a precept to the overseers and may enforce compliance before justices (*r*)

A parish council can spend money only on purposes which are expressly or impliedly authorised by statute and improper expenditure may be controlled by the audit or the courts (*s*). Like any other local authority it may expend money out of its funds to protect its property rights and privileges including for this purpose, and in proper cases the opposing of private Bills in Parliament (*t*)

Expenses and liabilities (*a*) which involve a rate exceeding three pence in the pound for any local financial year namely, the twelve months ending on the 31st March (*b*), cannot be incurred without the consent of the parish meeting (*c*) and any expense or liability involving a loan requires the consent of the parish meeting and the approval of the county council (*d*)

The sum raised in any financial year for expenses including annual charges whether of principal or interest in respect of loans but excluding expenses under adoptive Acts (*e*) must not exceed a sum equal to a rate of sixpence in the pound on the rateable value (*f*) of the parish at the commencement of the year (*g*)

Government Act 1891 (56 & 57 Vict c 73) s 11 (4)) As to the expenses under adoptive Acts see p 260 *post*

(*p*) Local Government Act 1894 (56 & 57 Vict c 73) s 11 (4)

(*q*) Where there is no parish council the parish meeting has the like power see p 259 *post*

(*r*) Local Government Act 1894 (56 & 57 Vict c 73) s 11 (4) The demand note must state in the form prescribed by the Local Government Board the proportion of rate levied for the expenses (*ibid* s 11 (5)) The contributions are required under the Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) s 26 in form of precept see Order of Local Government Board 11th February 1895 No 448 See also titles POOR LAW RATES AND RATING As to the enforcement of orders of justices see title MAGISTRATES pp 389 *et seq* *post*

(*s*) As to audit see pp 244 260 *post*

(*t*) The Borough Funds Act 1872 (35 & 36 Vict c 91) as to which see pp 290 380 *post* does not appear to apply to parish councils For private Bill procedure see title PARLIAMENT

(*a*) As to the meaning of expenses and liabilities see Local Government Act 1888 (51 & 52 Vict c 41) s 100 which definitions are made applicable by the Local Government Act 1894 (56 & 57 Vict c 73) s 10 (1) As to the former liability of parish councils to repair highways and as to their power to repair footpaths see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 20 note (b) 29 183

(*b*) Local Government Act 1894 (56 & 57 Vict c 73) s 75 (1) Local Government Act 1888 (51 & 52 Vict c 41) s 73

(*c*) Local Government Act 1894 (56 & 57 Vict c 73) s 11 (1)

(*d*) *Ibid* s 11 (1) (2)

(*e*) See *ibid* s 7 (1) The adoptive Acts which authorise the borrowing of money are the Baths and Washhouses Acts 1846—1882 (see p 251 *post* and title PUBLIC HEALTH AND LOCAL ADMINISTRATION) the Burial Acts 1852—1885 (see p 257 *post* and title BURIAL AND CREMATION Vol III pp 49 *et seq*), the Public Libraries Act 1892 (55 & 56 Vict c 53) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) but not the Lighting and Watching Act 1833 (3 & 4 Will 4 c 90) (see title GAS Vol XV, p 308) Under the first three of these sets of Acts the Public Works Loan Commissioners may advance loans As to these adoptive Acts generally see p 257 *post*

(*f*) That is the rateable value stated in the valuation list in force or if none, in the last poor rate (Local Government Act 1894 (56 & 57 Vict c 73) s 75 (2))

(*g*) *Ibid* s 11 (3)

SECT 1  
The Parish  
Borrowing  
powers

**494** A parish council may with the consent of the Local Government Board, borrow money required for purchasing any land or building or for erecting any buildings which it is authorised to purchase or build for authorised purposes under adoptive Acts (*h*), for any permanent work or other thing which it is authorised to execute or do and the cost of which ought in the opinion of the county council and the Local Government Board, to be spread over a term of years (*i*) and for paying a capital sum on the adjustment of property debts and finance (*j*)

The money is borrowed in the same way and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts (*k*) with the exception that the security is to be the poor rate (*l*) and the whole or part of the revenues of the parish council, and that the power of borrowing is limited to half of the assessable value of the parish (*m*). The required money may be lent by the county council and the latter in turn may raise a loan for the purpose (*n*)

Accounts

**495** The accounts of receipts and expenditure of the parish council then committees and officers, must be made up yearly to the 31st March in the form prescribed by the Local Government Board (*o*). They are open to the inspection of parochial electors (*p*) at all reasonable times without payment and copies and extracts may be taken (*q*)

Audit

**496** The accounts are audited by a district auditor in the same way as the accounts of urban sanitary authorities and their officers are audited (*r*) subject to such modifications as the Local Government Board may make concerning the publication of notice of the audit and of the abstract of accounts and the report of the auditor (*s*)

(iii) Meetings

Place of  
meetings

**497** The meetings are usually held in some public room vested in the council. Failing this the council may use free of charge but subject to the payment of expenses and damages and subject to

(*h*) See note (e) p 213 *ante*

(*i*) Local Government Act 1894 (56 & 57 Vict c 3) s 12 (1)

(*j*) *Ibid* s 68 (4)

(*k*) The Public Health Act 1875 (38 & 39 Vict c 55) ss 233 234 236—239 are applied subject to the exceptions stated. See further title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*l*) In the case of money borrowed for the purposes of the adoptive Acts the charge will be upon the rate applicable to such Acts (Local Government Act 1894 (56 & 57 Vict c 3) s 12 (3))

(*m*) *Ibid* s 12 (1)

(*n*) *Ibid* s 12 (2)

(*o*) *Ibid* s 58 (1)

(*p*) As to parochial electors see title ELECTIONS Vol VII p 191

(*q*) Local Government Act 1894 (56 & 57 Vict c 73) s 58 (4)

(*r*) *Ibid* s 58 (2) see pp 260 284 *post*

(*s*) Local Government Act 1894 (56 & 57 Vict c 73) s 58 (3) The orders in force are dated 20th May 26th July 1890 22nd March 1891 20th, 26th 27th April 1900.

the convenience of other persons interested the buildings of schools supported by parliamentary grants and other premises supported out of local rates (t)

SECT 1

The Parish

The council may not meet on licensed premises unless there is no other place to be had (u)

Licensed  
premises

**498** On or within seven days following the 10th April in each year the council must hold the annual meeting (a) the first business thereat being the election of a chairman and the appointment of overseers (b)

Annual  
meeting

Meetings are convened by the chairman either on his own initiative or on a requisition signed by two members of the council. If in the latter case the chairman refuses or for seven days neglects to call a meeting any two members may do so forthwith (c)

Convening of  
meetings

One third of the members being three at least form a quorum (d)

Three clear days notice of every meeting must be given (e). It must be signed by or on behalf of the chairman or persons convening the meeting and given to every member (f), and it must state the time place and business of the intended meeting (g). In the case of an annual meeting a similar notice must be given to every member immediately after his election (h)

**499** All meetings of the council are to be open to the public unless the council otherwise directs (i). The admission of representatives of the Press to the meetings of the council and committees is governed by statute (k)

Open to  
public

**500** A record must be kept of members present at the meetings and of the votes given (l). A majority of votes of those present and voting decides all questions (m). When the votes are equal the chairman has a second or casting vote (n)

Proceedings.

(t) Local Government Act 1894 (56 & 57 Vict c 73) s 4

(u) *Ibid* s 61

(a) Parish Councillors (Tenure of Office) Act 1899 (62 & 63 Vict c 10) s 1 (5). As to the convening of the first meeting see Local Government Act 1894 (56 & 57 Vict c 73) s 78 (1). There must be at least three other meetings each year (*ibid* Sched I Part 2 (13)).

(b) *Ibid* s 3 (10) Sched I Part 2 (3). As to chairman see p 241 *ante* and as to overseers see p 249 *post*.

(c) Local Government Act 1894 (56 & 57 Vict c 73) s 3 (10) Sched I Part 2 (4).

(d) *Ibid* s 3 (10) Sched I Part 2 (4).

(e) As to publication of notices see *ibid* ss 3 (10) & 1 Sched I Part 2 (6) (15).

(f) As to service see *ibid* Sched I Part 2 (6).

(g) *Ibid* s 3 (10) Sched I Part 2 (5).

(h) *Ibid*

(i) *Ibid* s 3 (10) Sched I Part 2 (13).

(k) Local Authorities (Admission of the Press to Meetings) Act 1908 (8 Fdw 7, c 48) ss 1 & 5. *Ibid* s 2 defines representatives of the Press and relates to committees and see title PRESS AND PRINTING.

(l) Local Government Act, 1894 (56 & 57 Vict c 73) s 3 (10) Sched I, Part 2 (8).

(m) *Ibid* Sched I Part 2 (9).

(n) *Ibid*, Sched I, Part 2 (10).



SECT 1 Cheques and orders for payment must be signed by two  
The Parish members (o)

(iv) Committees

Committees **501** Committees may be appointed which may consist wholly or partly of members of the council. A committee holds office until but not beyond the next annual meeting, and the acts of the committee must be submitted to the council for approval (p)

The parish council may regulate the quorum proceedings, place of meeting and area of jurisdiction of the committees but subject thereto the committees may arrange matters of business themselves. The chairman of committees has a second or casting vote (q)

The parish council may concur with other parishes or district councils in appointing from their respective bodies a joint committee for any purpose in respect of which they are jointly interested (r). Such committee cannot hold office beyond the expiration of fourteen days after the next annual meeting of any of the councils appointing it (s)

(v) Powers and Duties

Transferred  
powers of  
parish  
councils

**502** Numerous powers and duties formerly possessed by other bodies have been transferred to the parish councils (a) namely (1) the appointment of overseers and of an assistant overseer and revocation of such appointments (b) (2) the powers duties and liabilities (c) of the parish vestry (d) except such as relate to the affairs of the Church (e) or to ecclesiastical charities (f)

(o) Local Government Act 1894 (56 & 57 Vict c 3) s 3 (10) Sched I Part 2 (14)

(p) *Ibid* s 56 (1) Where a parish council has power and duties to be exercised in part only of the parish or in relation to property held by it for the benefit of part of a parish and the part has a defined boundary the parish council must on the request of a parish meeting held for that part appoint annually a committee consisting partly of members of the council and partly of other persons representing that part of the parish to exercise such powers and duties (*ibid* s 56 (2)). This applies also under similar circumstances to joint committees appointed under *ibid* s 57 (*ibid* s 57 (3)) see the text *infra*

(q) *Ibid* s 56 (3) Sched I Part 4

(r) *Ibid* s 57 (1) (2) The power of borrowing money or making a rate cannot be delegated

(s) *Ibid* s 57 (3) As to the costs of the joint committee see *ibid* s 57 (4)

(a) *Ibid* ss 56 & 57

(b) *Ibid* s 56 (1)

(c) These words have the same meaning as in the Local Government Act 1888 (51 & 52 Vict c 41) s 100 (Local Government Act 1894 (56 & 57 Vict c 73) s 75 (1))

(d) The vestry means the inhabitants of the parish whether in vestry assembled or not and includes any select vestry either by statute or at common law (*ibid* s 75 (2)). As to select vestries see title ECCLESIASTICAL LAW, Vol XI pp 458 *et seq*

(e) See Local Government Act 1894 (56 & 57 Vict c 73) s 75 (2)

(f) See *ibid*

or such as are expressly transferred to other authorities (g), (8) the civil powers and duties of the churchwardens other than as overseers (h), which include certain functions relating to charities (i), closed churchyards (k), and the convening of vestry meetings (l), (4) the powers and duties of overseers or of churchwardens and overseers (m) to object to valuation lists for poor rate purposes, to appeal against such lists and in respect of appeals by other persons against poor rates (n) to object to and appeal against the basis of the county rate or the rate itself (o) to provide and maintain parish books and chests (p), vestry rooms (q) fire engines and apparatus (r) to hold and manage parish property (s) village greens or allotments whether for recreation grounds or otherwise (t) (5) the powers exercisable with the approval of the Local Government Board by the board of guardians of the union in which the parish lies in respect of the sale exchange or letting of parish property (a) (6) the power of executing such adoptive Acts as have been or may be adopted by the parish meeting (b) and where the area of any existing authority executing such Acts is co extensive with the parish the parish council when it comes into existence takes over all the powers duties and liabilities of that authority (c)

(j) Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) The powers of the vestry so transferred include their powers of arranging with owners for the rating of small tenements (Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict c 41) ss 3 4 see title RATES AND RATING) their powers as a

local authority under the Gas and Water Works Facilities Act 1870 (33 & 34 Vict c 40) s 2 Sched A (see titles GAS Vol XV p 13 WATER SUPPLY) and the Tramways Act 1870 (33 & 34 Vict c 78) s 3 Sched A Part 1 (see title TRAMWAYS AND LIGHT RAILWAYS) their powers to secure the appointment of parish constables (Parish Constables Act 1872 (35 & 36 Vict c 32) see title POLICE) to authorise overseers to charge on the poor rates certain expenses under the Union Assessment Acts (Union Assessment Committee Amendment Act 1864 (27 & 28 Vict c 39) s 7 see title RATES AND RATING) to appoint inspectors under the Knackers Act 1886 (50 Geo 3 c 1) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) and to consent to the payment of extra remuneration to collectors of separate rates for sanitary purposes (Public Health Act 1875 (38 & 39 Vict c 55) s 230)

(h) Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (b)

(i) See title CHARITIES Vol IV p 211

(k) Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (b) see title BURIAL AND CREMATION Vol III p 529

(l) See p 261 *post*

(m) Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (c) In an appeal against a poor rate in a rural parish the parish council is respondent (*R v De Grey* [1900] 1 Q B 521)

(n) See title RATES AND RATING

(o) Under the County Rates Act 1892 (15 & 16 Vict c 51) ss 14 15 see title RATES AND RATING and p 310 *post*

(p) See p 253 *post*

(q) See p 253 *post*

(r) See p 253 *post* and title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(s) See pp 240 *ante* 252 *post*

(t) See titles ALLOTMENTS Vol I p 336 OPEN SPACES AND RECREATION GROUNDS

(a) See p 252 *post*

(b) Local Government Act 1894 (56 & 57 Vict c 73) s 7 (1) and see p 244 *ante* As to adoptive Acts see also p 257 *post*

(c) Local Government Act 1894 (56 & 57 Vict c 73) s 7 (1)

## SECT. 1.

**The Parish****Miscellaneous powers**(vi) *Additional Powers and Duties (d)*

**503** Besides the power of appointing officers (*e*) and the powers in respect of property and documents (*f*), parish councils have powers to acquire, by purchase or hiring by agreement (*g*) or by gift (*h*), or under certain conditions, compulsorily (*i*), land or buildings for parochial purposes (*j*), or for recreation grounds and public walks (*k*) to regulate recreation grounds village greens, open spaces and public walks and to exercise in respect of them certain powers exercisable by urban authorities over similar places (*l*) to secure the regulation and inclosure of commons (*m*) to acquire land for common pasture (*n*) in respect of public footpaths (*o*), in respect of natural water supplies but not so as to interfere with private rights (*p*) to execute or contribute to the expense of, works for the exercise of their conferred powers or in relation to parish property, other than the property of the Church or ecclesiastical charities (*q*) to deal with offensive ditches and the like (*r*) to execute adoptive Acts when adopted by the parish meeting (*s*) to

(*d*) As to parochial charities and property held in trust for the parish see title CHARITIES Vol IV p 264

(*e*) See p 249 *post*

(*f*) See pp 250 253 *post*

(*g*) Local Government Act 1894 (56 & 57 Vict c 73) s 9 (1) The Lands Clauses Consolidation Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 12 *et seq* 167) except the provisions relating to the purchase of land otherwise than by agreement apply and also the Public Health Act 1875 (38 & 39 Vict c 55) s 146 relating to lands belonging to the Duchy of Lancaster (see title CONSTITUTIONAL LAW Vol VII p 221) Persons authorised to sell land may lease it to the council for a term not exceeding thirty five years (Local Government Act 1894 (56 & 57 Vict c 73) s 9 (13) applying with adaptations the Allotments Act 1887 (50 & 51 Vict c 48) s 3 (7))

(*h*) Local Government Act 1894 (56 & 57 Vict c 73) s 9 (1)

(*i*) *Ibid* s 9 (2)—(19) see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 167 *et seq*

(*j*) Local Government Act 1894 (56 & 57 Vict c 73) s 8 (1) (*a*)

(*k*) *Ibid* s 8 (1) (*b*)

(*l*) *Ibid* s 8 (1) (*d*) The powers exercisable are those of an urban authority under the Public Health Act 1875 (38 & 39 Vict c 55) s 164 and the Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 44 See title OPEN SPACES AND RECREATION GROUNDS for further powers in respect of the same places see as to the powers transferred from the churchwardens and overseers pp 246 247 *ante*

(*m*) Local Government Act 1894 (56 & 57 Vict c 73) s 8 (1) (*c*) (*4*) See title COMMONS AND RIGHTS OF COMMON

(*n*) Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) s 34

(*o*) Local Government Act 1894 (56 & 57 Vict c 73) ss 8 (1) (*g*) 9 (15) 13 (1) (2) see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 29 183

(*p*) Local Government Act 1894 (56 & 57 Vict c 73) s 8 (1) (*e*) This does not relieve the district council of any obligation as to the supply of water (*ibid* s 8 (3)) Land for the supply of water cannot be acquired except by agreement (*ibid* s 9 (1)) and see title WATER SUPPLY A parish council has no right of action in its own name and without the Attorney General to enforce the claim of the inhabitants to the use of natural water in the parish (*Stoke Parish Council v Price* [1899] 2 Ch 277)

(*q*) Local Government Act 1894 (56 & 57 Vict c 73) s 8 (1) (*i*) (*1*)

(*r*) *Ibid* s 8 (1) (*f*) and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*s*) Local Government Act 1894 (56 & 57 Vict c 73) s 7 (7) and see p 247 *post*

## PART I.—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

complain or make representations as to unhealthy dwelling houses or obstructive buildings (t) and to complain to the county council of the neglect of the rural district council in matters of public health, maintenance of highways or protection of rights of way (a)

SECT I  
The Parish.

The parish council is entitled to receive notice from the rural district council before the latter enters into any contract for the sewerage or water supply of a contributory place in the parish (b), and may also apply to the Local Government Board to confer urban powers on the rural district council with respect to any parish or part of a parish (c)

Powers with regard to rural district council

Other conferred powers relate to small holdings (d), allotments (e) isolation hospitals (f) and postal facilities (g)

Other conferred powers

Powers which may be delegated by a rural district council to a parochial committee under the Public Health Acts may be delegated to a parish council (h)

Delegation of powers

### (VII) Officers

**504** The overseers of the poor are essential officers of a parish but beyond these the parish council may appoint one or more assistant overseers (i), a poor rate collector a treasurer and a clerk (j)

Parochial officers

In all cases where powers and duties of an authority (other than justices) are transferred to a parish council the existing officers of that authority become the officers of the council and for this purpose the body appointing a surveyor of highways is deemed a highway authority and any paid surveyor an officer of that body (k)

All such officers hold office by the same tenure and upon the same terms and conditions as formerly and whilst performing the

(t) Local Government Act 1894 (56 & 57 Vict c 3) s 6 (2) see p 316 *post* and title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(a) Local Government Act 1894 (56 & 57 Vict c 73) ss 16 (1) (2) 26 (4) see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION HIGHWAYS STREETS AND BRIDGES Vol XVI pp 100 *et seq* 167

(b) Local Government Act 1894 (56 & 57 Vict c 73) s 16 (3) and see title SEWERS AND DRAINS

(c) Local Government Act 1894 (56 & 57 Vict c 3) s 25 (1)

(d) Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) s 3 (2) (4) and see title SMALL HOLDINGS AND SMALL DWELLINGS

(e) Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) ss 23 (1) 50 (2) and see title ALLOTMENTS Vol I pp 336 *et seq*

(f) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(g) See title POST OFFICE

(h) Local Government Act 1894 (56 & 57 Vict c 73) ss 15 17 As to delegation by a rural district council see p 331 *post* If a parochial committee be formed consisting partly of members of the district council and partly of other persons these other persons must be or be selected from the members of the parish council (Local Government Act 1894 (56 & 57 Vict c 73) s 15)

(i) *Ibid* s 5 (1) and see generally titles POOR LAW RATES AND RATING

(j) Local Government Act 1894 (56 & 57 Vict c 73) s 17 (3) (6)

(k) *Ibid* s 81 and see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 124 As to the meaning of the word existing see Local Government Act 1898 (51 & 52 Vict c 41) s 100 applied by Local Government Act, 1894 (56 & 57 Vict c 73) s 75 (1)

**SECT 1**     **same duties they are to receive not less salary or remuneration**  
**The Parish**     **than before (l)**

Where a parish is divided any officer of the parish continues to hold office for each parish or district thereby formed his salary being borne by those parishes or districts in proportion to their rateable value (*m*) at the commencement of the next financial year (*n*)

**Overseers**     **505** The parish council must appoint overseers at its annual meeting and, as soon as possible must fill any casual vacancy occurring in the office giving notice of such appointments to the board of guardians (*o*)

The parish council may also appoint or revoke the appointment of an assistant overseer for its parish (*p*)

**Clerk.**     **506** If at the time of the constitution of the parish council there is an existing vestry clerk (*q*) in the rural parish he is to become the clerk of the parish council even though there be an assistant overseer for the parish (*r*) In all other cases the parish council may appoint a clerk but not a vestry clerk (*s*) and the clerk may be one of the council acting without remuneration Failing such appointment the assistant overseer or one of the assistant overseers, chosen by the council is to be the clerk and these duties are to be taken into account in determining his salary and in the event of there being no assistant overseer the council may appoint as its clerk a collector of poor rates or some other fit person with such remuneration as is thought proper (*t*)

**Treasurer**     **507** The parish council may also appoint one of its own number or some other person to be treasurer but without remuneration He must give such security as may be required under the regulations of the county council (*a*)

(iii) *Parish Property and Rights*

(a) *In General (b)*

**Vesting of parish property**     **508** The legal interest in all property formerly vested in the overseers or in the churchwardens and overseers of a rural parish

(l) Local Government Act 1894 (56 & 57 Vict c 73) s 81 (4) Officer means the holder of any place situation or employment (Local Government Act 1888 (51 & 52 Vict c 41) s 100 applied by the Local Government Act 1894 (56 & 57 Vict c 73) s 70 (1)

(m) Rateable value means the rateable value stated in the valuation list in force or if there be no such list in the last poor rate (Local Government Act 1894 (56 & 57 Vict c 73) s 15 (2))

(n) *Ibid* s 81 (5)

(o) *Ibid* s 5 (1) As to overseers see further titles POOR LAW RATES AND RATING

(p) Local Government Act 1891 (56 & 57 Vict c 73) s 5 (1)

(q) Appointed under the Vestries Act 1850 (13 & 14 Vict c 57)

(r) Local Government Act 1894 (56 & 57 Vict 73) s 81 (2)

(s) *Ibid* s 17 (4)

(t) *Ibid* s 17 (1) — (3)

(a) *Ibid* s 17 (6)

(b) The subject of parochial charities and of property held by trustees for public parochial purposes is dealt with in title CHARITIES Vol IV p 263

except property connected with the affairs of the Church (c), or held for an ecclesiastical charity (d) is vested in the parish council, subject to all trusts and liabilities affecting the property (e)

SECT 1  
The Parish.

The property referred to consisted of all buildings lands and hereditaments belonging to the parish which for security had been vested in the churchwardens and overseers and their successors (f) for and on behalf of the parish (g) or in the overseers where there were no churchwardens (h). It included freehold and leasehold (i) but not copyhold (j) property even though held before the Poor Relief Act 1819 (k) came into operation (l) provided that it belonged to the parish that is property held for the general benefit of the parish the profits of which were applied to the relief of the poor or were applicable for any of the purposes for which church rates were levied even though the property had been originally vested in trustees (m). But it did not include property

(c) For the definition of affairs of the Church see Local Government Act 1894 (56 & 57 Vict c 73) s 5 (2)

(d) For the definition of ecclesiastical charity see *ibid* title CHARITIES Vol IV p 257 note (e) ECCLESIASTICAL LAW Vol XI pp 355 note (c) 113

(e) Local Government Act 1894 (56 & 57 Vict c 73) s 5 (2) (c) As to the summary determination of questions relating to vesting see *ibid* s 70 (1). As to the general rules relating to transfer, see *ibid* ss 67 68. The Charitable Trusts Act 1893 (16 & 17 Vict c 131) s 48 requiring the consent of a corporation to an order under the Charitable Trusts Acts 1893--1891 vesting the legal estate of charity lands in the Official Trustee does not apply to property vested in the churchwardens and overseers by virtue of the Poor Relief Act 1819 (59 Geo 3 c 12) and the consent of the parish council is not necessary but its active powers of management are not affected (Local Government Act 1894 (56 & 57 Vict c 73) s 52 (4) and see title CHARITIES Vol IV p 280)

(f) They were not thereby constituted a proper body corporate with all the legal incidents and restrictions belonging to a corporation by the common law. Thus their assent and entry under a demise to them sufficed to vest the property in them on behalf of the parish without any acceptance by an instrument under the seal of the supposed corporation (*Smith v Adkins* (1841) 3 M & W 362) and any of the churchwardens or overseers might authorise a distress (see title ECCLESIASTICAL LAW Vol XI pp 131 466)

(g) Poor Relief Act 1819 (59 Geo 3 c 12) s 11 and see title CHARITIES Vol IV pp 251 258

(h) Poor Relief Act 1819 (59 Geo 3 c 12) s 35

(i) *Doe d Hobbs v Cockell* (1836) 4 Ad & Ell 418 S C *sub nom Doe d Higgs v Cockell* (1836) 6 Nev & M (K B) 119 *Smith v Adkins supra* *Gouldsworth v Knights* (1843) 11 M & W 337

(j) *A G v Lewin* (1831) 8 Sim 56 *Le Iaddington Charities* (1837) 8 Sim 629 *Doe d Bailey v Foster* (1816) 3 C 1 110

(k) 59 Geo 3 c 12

(l) *Deptford (Churchwardens) v Stetchley* (1841) 8 Q B 391 *Doe d Jackson v Hiley* (1830) 10 B & C 58; *Doe d Hobbs v Cockell supra* *Doe d Higgs v Cockell supra* *Doe d Higgs v Lerry* (1835) 4 Ad & Ell 211

(m) *Doe d Jackson v Hiley supra* *Doe d Higgs v Lerry supra* *Doe d Hobbs v Cockell supra* *Doe d Higgs v Cockell supra* *Deptford (Churchwardens) v Stetchley supra* *Alderman v Neate* (1859) 4 M & W 704 *Re Hackney Charities* *Ex parte Nicholls* (1865) 34 L J (Ch) 165 not affected on the point on appeal 34 L J (Ch) 176 C A see *Haigh v West* [1893] 2 Q B 19 C A. A lease executed by churchwardens describing the demised tenement as parcel of the lands of the parish church and reserving payment of rent to them is *prima facie* evidence that the land is parish property even though the lease is expressed to be made with the consent and approbation of the vicar and the majority of the aldermen and burgesses and of the inhabitants and parishioners and though the lease is indited with a memorandum expressing the consent of certain

SECT 1  
The Parish

Powers of  
holding and  
management

of which the trustees were known (*n*), or where the objects of the trusts or the modes of relief were not general but special (*o*)

**509** The parish council has the powers, duties and liabilities formerly possessed by the overseers or by the churchwardens and overseers of holding and managing parish property generally, not being property relating to the affairs of the Church or held for an ecclesiastical charity (*p*) and it may also exercise the powers formerly exercised by the board of guardians over parish property (*q*), but the consent of the parish meeting is necessary (*r*) except in the case of a single parish having a separate board of guardians (*s*)

subscribing parishioners (*Doe d Higgs v Cockell* (1836) 6 Nev & M (K B) 149 S C sub nom *Doe d Hobbs v Cockell* (1836) 4 Ad & El 418

(*n*) *Deptford (Churchwardens) v Sketchley* (1847) 8 Q B 394 overruling on this point *Rumball v Munt* (1846) 8 Q B 382 and apparently by implication overruling *Ex parte Annesley* (1836) 2 Y & C (Ex) 350 see also *Doe d Edney v Billett* (1845) 1 Q B 916 983

(*o*) *Deptford (Churchwardens) v Sketchley supra* e.g. a trust for the binding of apprentices as well as for the relief of the poor and the repair of the church (*A G v Lewin* (1831) 8 Sim 366 *Allason v Stark* (1838) 9 Ad & El 250) for purchasing bread for the poor of the parish (*Re Paddington Charities* (1837) 8 Sim 629) for the relief of the most poor and needy people of good life and conversation (*Allason v Stark supra*)

(*p*) Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (c) (iii) *A G and Spalding Rural Council v Garner* [1907] 2 K B 480 (right of property in grass and herbage on an awarded road) *Haigh v West* [1893] 2 Q B 19 C A As to its power to discharge tithe rentcharge by giving land in lieu thereof see the Tithe Act 1839 (2 & 3 Vict c 62) s 21 Tithe Act 1840 (3 & 4 Vict c 10) s 17 and as to tithe generally see title ECCLESIASTICAL LAW Vol XI pp 742 *et seq* As to affairs of the Church and ecclesiastical charity see notes (c) (d) p 251 *ante* and title CHARITIES Vol IV pp 263 264 As to powers of sale leasing and exchange see *ibid* pp 222 223 230 233 Local Government Act 1894 (56 & 57 Vict c 73) s 8 (2) As to powers with regard to allotment lands see title ALLOTMENTS Vol I pp 336 *et seq* and as to exhausted parish lands used for the supply of materials see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 108 109

(*q*) Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (d) The powers are those under the Union and Parish Property Act 1835 (5 & 6 Will 4 c 69) extended to copyhold lands by the Union and Parish Property Act 1837 (1 Will 4 & 1 Vict c 50) s 2 and the Parish Property and Debts Act 1842 (5 & 6 Vict c 18) s 4 It must be property for the general benefit of the ratepayers parishioners or inhabitants (*ibid* s 2) The produce of sales is applied as directed by the Local Government Board and land taken in exchange is subject to the same trusts as the land exchanged (Union and Parish Property Act 1835 (5 & 6 Will 4 c 69) s 3) As to mode of conveyance see *ibid* s 6 and the Union and Parish Property Act 1837 (7 Will 4 & 1 Vict c 50) s 4 The concurrence of the trustees in whom the legal estate is outstanding is not necessary (Parish Property and Parish Debts Act 1842 (5 & 6 Vict c 18) s 3) Copyhold lands are included and provision is made for enfranchisement (Union and Parish Property Act 1837 (7 Will 4 & 1 Vict c 50) ss 2 3) As to where several parishes are jointly interested in the property see the Parish Property and Parish Debts Act 1842 (5 & 6 Vict c 18) s 3 Local Government Act 1894 (56 & 57 Vict c 73) s 8 (1)

(*r*) Union and Parish Property Act 1835 (5 & 6 Will 4 c 69) s 3 Parish Property and Parish Debts Act 1842 (5 & 6 Vict c 18) s 2 Local Government Act 1894 (56 & 57 Vict c 73) s 8 (1)

(*s*) Local Law Act 1849 (12 & 53 Vict c 56) s 8 There are other powers of sale of the guardians which do not appear to be transferred namely under the Baths and Washhouses Acts 1846—1882 (see p 257 *post* and title PUBLIC HEALTH AND LOCAL ADMINISTRATION) the Public Libraries Act, 1892

**510** Buildings or land for buildings to be used for the purpose of parish business may be provided or acquired by the parish council (f) SECT I  
The Parish

**511** Land no longer required or not suitable for parish purposes may with the consent of the Local Government Board be sold let or exchanged (u) Power of  
acquiring  
Power to sell  
surplus land

**512** Fire engines and fire apparatus for the parish and a proper place for keeping them may be provided (i) The parish council may also agree with the council of a neighbouring borough or district for the use of its fire engines apparatus and men (a) Fire  
apparatus

(b) *Parish Documents and Pools*

**513** Minute books must be provided by the parish council (h) for its use and it may provide proper depositories for all parochial books and papers which are not otherwise provided for by law (c) Parochial electors may inspect them free of charge and take extracts (d) Custody of  
documents

All documents required by Acts or Standing Orders of Parliament to be deposited with the parish clerk of a rural parish must be deposited with the clerk of the parish council or, if there be none with the chairman and the same rights of inspecting and

(55 & 56 Vict c 53) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) the School Sites Act (see title EDUCATION Vol XII p 115) the Literary and Scientific Institutions Act 1854 (1 & 18 Vict c 112) (see title LITERARY AND SCIENTIFIC INSTITUTIONS pp 190 *et seq ante*) As to the Burial Acts 1857—1880 see p 201 *post* and title BURIAL AND CREMATION Vol III p 49

(f) Local Government Act 1894 (56 & 57 Vict c 3) s 8 (a) and see Parochial Offices Act 1861 (24 & 25 Vict c 125) s 1 Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (c) (u) as to parishes with a population exceeding 4 000 As to power to provide a parish room in parishes with over 2 000 inhabitants see *ibid*

(u) Local Government Act 1894 (56 & 57 Vict c 3) s 9 (13) Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) s 32 (1)—(3) the latter taking the place of the Allotments Act 1881 (50 & 51 Vict c 45) s 11 which it repeals see title ALLOTMENTS Vol I p 333 As to the application of the proceeds of sale or exchange and as to the incorporation of the provisions of the Lands Clauses Consolidation Act 1813 (5 & 9 Vict c 18) ss 128—132 relating to the right of pre-emption of superfluous lands see title SMALL HOLDINGS AND SMALL DWELLINGS

(i) Poor Law Amendment Act 1861 (30 & 31 Vict c 106) s 29 This power is transferred by the Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1) (c) (u) Similar provision may be made under the Lighting and Watching Act 1833 (3 & 4 Will 4 c 90) s 44 if and when adopted by a parish meeting (see title GAS Vol XV p 308) for a parish or part of a parish (see Lighting and Watching Act 1833 (3 & 4 Will 4 c 90) ss 4 73)

(a) Parish Fire engines Act 1898 (61 & 62 Vict c 138) s (1) see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(b) Vestries Act 1818 (58 Geo 3 c 69) s 2 This is one of the duties transferred by the Local Government Act 1894 (56 & 57 Vict c 73) s 6 (1)

(c) (u) (c) Parochial Office Act 1861 (24 & 25 Vict c 125) s 1 This is also a transferred power (Local Government Act, 1894 (56 & 57 Vict c 73), s 6 (1) (c) (u))

(d) *Ibid*, s 58 (4)



SECT 1  
\* The Parish of taking copies of or extracts from such documents remain as prior to 1894 (c)

Documents directed by law to be kept with the public books, writings and papers of the parish (f), and all other public books writings and papers of the parish, except registers of baptism marriages and burials or relating to the affairs of the Church or to ecclesiastical charities (g) remain in the same custody as before 1894 or may be deposited in such custody as the parish council may determine (h) But the incumbents and churchwardens on the one side and the parish council on the other have mutual rights of reasonable access to the documents in the hands of the others and any difference as to custody or access is to be settled by the county council (i)

The county council has power to inquire into the manner in which documents under the control of the parish council are kept and to make orders relating thereto (k) and an order grouping parishes must provide for the custody of documents in each parish (l)

#### SUB SECT 2—The Parish Meeting

##### (1) Constitution

##### (a) In General

Parish meeting

**514** The parish meeting consists of the parochial electors (m) of the parish or ward and no others (n)

##### (b) If there is no Parish Council

The body corporate

**515** Where there is no parish council the chairman of the parish meeting and the overseers are a body corporate by the name of the chairman and overseers of the parish They have perpetual succession and may hold land for the purposes of the parish without licence in mortmain They act under the directions of the parish

(e) Local Government Act 1894 (56 & 57 Vict c 13) s 17 (1) Documents are required to be so deposited under the Standing Orders of Parliament relating to private Bills (see title PARLIAMENT) the Railways Clauses Consolidation Act 1845 (8 & 9 Vict c 20) ss 8 9 Tramways Act 1870 (33 & 34 Vict c 78) s 6 By the Parliamentary Documents Deposit Act 1837 (7 Will 4 & 1 Vict c 83) provision is made for the deposit of documents under Standing Orders and for inspecting and copying them or taking extracts therefrom

(f) See the Vestries Act 1818 (58 Geo 3 c 69) s 6 Local Government Act 1894 (56 & 57 Vict c 13) ss 6 (1) (a) 10 (2)

(g) See notes (c) (d) p 211 ante

(h) As to proper custody for the purpose of evidence see title EVIDENCE Vol XIII pp 512 et seq

(i) Local Government Act 1891 (56 & 57 Vict c 73) s 17 (8) see *Lewis v Cole* [1898] 1 Q B 164

(k) Local Government Act 1894 (56 & 57 Vict c 73) ss 17 (9) 40

(l) *Ibid* s 38 (3)

(m) See title DIRECTIONS Vol XII pp 191 192 246 and see *ibid* p 202 note (a)

(n) Local Government Act 1894 (56 & 57 Vict c 73) ss 2 (1) 49 (a) All provisions with respect to a parish meeting for the whole of a parish apply as if the ward or part were the whole parish (Local Government Act 1894 (56 & 57 Vict c 73) s 49 (1))

meeting, and these acts are executed under the hands and seals when necessary of the chairman and overseers (o)

SECT I  
The Parish

Chairman

**516** The chairman must be elected for each year at the annual assembly (p), or at a poll consequent thereon which poll may be demanded at the meeting by a single parochial elector (q)

Qualifications for the chairmanship are not expressly defined by statute but it is implied that he must be a parochial elector (r) Further the statutory provisions defining the disqualification of the chairman of other bodies (s) are not extended to the chairmanship of the parish meeting, and whilst it is expressly provided that neither sex nor marriage disqualifies for certain office, the chairmanship of the parish meeting is not one of them (t)

The retiring chairman is eligible for re election (a) The chairman may resign office by giving notice in writing to the parish meeting (b) A casual vacancy in the office is to be filled by the parish meeting and the person elected retires from the office at the next annual meeting (c)

**517** The meeting is usually held in some suitable public room vested in the parish council or in the chairman of the parish meeting and the overseers which can be used free of charge but failing this the parochial electors have the right to use a school house or other suitable room maintained out of any local rate (d)

Place of meeting

The meeting cannot be held on premises licensed for the sale of intoxicating liquors unless there is no other suitable room available either free or at a reasonable cost (e)

**518** The proceedings must not commence before 6 o'clock in the evening (f) and public notice of the meeting must be given (g)

Proceedings of meeting

Questions are decided by a majority of those present and voting and the announcement by the chairman of his decision as to the result is final, unless a poll is demanded before the conclusion of the meeting (h)

(o) Local Government Act 1894 (56 & 57 Vict c 1) s 19 (6) and see p 206 post and title CHARITIES Vol IV pp 137 258

(p) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (1) As to the annual assembly see p 206 post

(q) Local Government Act 1894 (56 & 57 Vict c 1) s 2 (7) Sched I Part 1 (7) and as to polls see p 260 post

(r) Thus the Local Government Act 1894 (56 & 57 Vict c 1) s 19 (11) refers to the acts of the parish meeting being signified by the chairman presiding at the meeting and two other parochial electors

(s) *Ibid* s 46

(t) The Qualification of Women (County and Borough Councils) Act 1907 (7 Edw 7 c 33) does not apply to this office

(a) Local Government Act 1894 (56 & 57 Vict c 73) s 47 (2)

(b) *Ibid* s 47 (3)

(c) *Ibid* s 47 (4)

(d) *Ibid* s 4

(e) *Ibid* s 61

(f) *Ibid* s 2 (3)

(g) As to time form contents and publication of the notice see *ibid*, s 2 (7) Sched I Part 1 (2) (3) and *ibid* s 51

(h) *Ibid* s 2 (1) Sched I Part 1 (o) (6) As to polls see p 260, post

**SECT 1**  
**The Parish**

**Votes.**

Every parochial elector has one vote on any one question, and in case of an election he has one vote for each of any number of persons not exceeding the number to be elected (*i*)

The chairman has a second or casting vote when the voting is equal (*k*)

**Minutes of meeting**

**519** Minutes must be kept and should be signed at the same or the next meeting by the chairman thereof. When so signed they are receivable in evidence without proof and the regularity of the meetings referred to and the qualification of the members thereat are presumed until the contrary is proved (*l*)

**Number of meetings Annual assembly**

**520** In parishes where there is no parish council there must be at least two meetings in the year (*m*). The first of these must be held between the 1st March and the 1st April inclusive and is called the annual assembly (*n*). Other meetings may be convened at any time by the chairman or any six parochial electors (*o*). The days, times, and places of the meetings are fixed by the chairman (*p*) subject to any statutory provisions (*q*). The parish meeting may regulate their own proceedings and business (*r*)

**Committees**

**521** Committees may be appointed by the parish meeting from among their own number. All acts of the committees must be submitted to the parish meeting for approval (*s*)

**Authentication of acts of parish meeting**

**522** Any act of the parish meeting may be signified by an instrument executed at the meeting under the hands and seals (if necessary) of the chairman presiding at the meeting and two other parochial electors there present (*t*) and any such instrument purporting to be so executed is deemed to have been duly executed until the contrary is proved (*a*)

(c) *Where there is a Parish Council*

**Annual assembly**

**523** There must be at least one parish meeting in the year to be held between the 1st March and the 1st April inclusive (*b*) and as

(i) Local Government Act 1894 (56 & 57 Vict c 73) s 2 (2)

(k) *Ibid* s 2 (7) Sched I Part 1 (8). In the absence etc of the elected chairman the meeting may appoint its own chairman (*ibid* Sched I Part 1 (10))

(l) *Ibid* s 2 (7) Sched I Part 1 (3)

(m) *Ibid* s 19 (2)

(n) Local Government Act 1894 (60 & 61 Vict c 1)

(o) Local Government Act 1894 (56 & 57 Vict c 73) 40 (3)

(p) *Ibid* s 40 (1)

(q) As to these see p 255 *ante*

(r) Local Government Act 1894 (56 & 57 Vict c 73) 2 (7) Sched I Part 3 (6). As to voting etc see p 255 *ante* and the text *supra*

(s) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (3). As to the right to demand a poll on the appointment of a committee and on a resolution to approve its acts see note (*h*) p 260 *post*

(t) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (11)

(a) *Ibid* s 2 (7) Sched I Part 3 (4)

(b) *Ibid* s 2 (3) and Local Government Act 1897 (60 & 61 Vict c 1) ss 2 3 repealing the Local Government Act 1894 (56 & 57 Vict c 73) Sched I Part 1 (1) for the general rules governing such

the parish council is elected in every third year dating from 1901 (c) the principal business of the annual assembly in such year is the election of the parish council and the meeting must be held in such year on the date fixed by the Local Government Board for the election which is generally the first Monday after the 10th March (d) At such meeting opportunity must be given for putting questions to and receiving explanations from any candidates who may be present Candidates may attend such meeting and speak but they cannot vote unless they are parochial electors of the parish (e)

The parish meeting may if necessary determine which of the retiring councillors shall fill vacancies not supplied by the election (f)

**524** Other meetings may be convened at any time by the chairman of the parish council or any two parish councillors (g) and meetings must be held on such days and at such times and places as the parish council may fix but subject to any statutory provisions (h)

**525** If the chairman of the parish council be present at the meeting and is not then a candidate for election he presides (i)

**526** Standing orders for the regulation of the proceedings of meetings may be made varied and revoked by the parish council (j)

SECT 1  
The Parish  
—

Other  
meetings

(Chairman)

Regulation of  
proceedings

#### (11) *Town Duties and Light*

##### (a) *Local Powers of the Parish Meeting*

**527** In every rural parish the parish meeting has the exclusive power of adopting certain Acts (l) namely the Lighting and Watching Act 1933 (l) Baths and Washhouses Acts 1846—1892 (m) Burial Acts 1852—1865 (n) Public Improvements Act 1860 (o) Public Libraries Act 1892 (p)

Adoptive  
Acts

meetings see Local Government Act 1991 (36 & 57 Vict Sched I Parts 1 & 3)

See p 242 ante

See Order of Local Government Board 14th January 1901 art 1 and Sched I

(e) Local Government Act 1894 (36 & 37 Vict c 73) s 2 (7) Sched I Part 1 (9)

(f) *Ibid* s 47 (1) and see p 242 ante

(g) Local Government Act 1914 (56 & 57 Vict c 73) 45 (3)

(h) *Ibid* s 45 (1) As to the holding of meetings see generally pp 244

see p 241 et seq ante

Local Government Act 1894 (36 & 57 Vict c 73) 45 (2)

*Ibid* s 2 (7) Sched I Part 3 (5)

*Ibid* s 7 Those Acts are referred to as the adoptive Acts (ibid)

3 & 4 Will 4 c 90 see title GAS Vol XV p 30,

(1846) 9 & 10 Vict c 74 (1847) 10 & 11 Vict c 61 (1878) 41 & 42 Vict c 14 (1892) 45 & 46 Vict c 30 see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(n) (1852) 15 & 16 Vict c 85 (1853) 16 & 17 Vict c 134 (1854) 17 & 18 Vict c 87 (1855) 18 & 19 Vict c 128 (1857) 20 & 21 Vict c 35 (1859) 20 & 21 Vict c 81 (1859) 22 Vict c 1 (1860) 23 & 24 Vict c 64 (1862) 25 & 26 Vict c 100 (1861) 34 & 35 Vict c 33 (1890) 43 & 44 Vict c 41 (1891) 44 & 45 Vict c 2 (1895) 48 & 49 Vict c 21 See title BURIAL AND CREMATION Vol III pp 400 492

(o) 23 & 24 Vict c 30 see title OPEN SPACES AND RECREATION GROUNDS

(p) 55 & 56 Vict c 53 see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

SECT 1  
The Parish

Consent  
where  
necessary

Where a parish council is in existence the consent of the parish meeting is required for the sale or exchange of land or buildings in the parish vested in the parish council (*g*) the incurring of expenses or liabilities by the parish council involving a rate exceeding threepence in the pound for any local financial year or a loan (*r*) the supporting or opposing of draft schemes for the administration of parochial charities (*s*)

The parish meeting exercises the powers or gives the consents (*a*) which were formerly exercised or given by the owners and rate payers of a parish or a majority of them under any of the Acts relating to the relief of the poor (*b*) or under the School Sites Acts (*c*) or the Literary and Scientific Institutions Act 1854 (*d*) so far as respects the dealing with parish property the spending of money or the raising of a rate (*e*)

(*h*) *Incumbent's Rights and Duties where there is no Parish Council*

Transferred  
powers

**528** Subject to the provisions of any grouping order (*f*) that may have been made the parish meeting of a parish in which no parish council exists has such powers rights and duties as are transferred to or are conferred or imposed upon it by statute (*g*) and such powers of a parish council as the county council may on the application of the parish meeting confer upon it (*h*)

The powers and duties transferred or conferred by statute are the powers duties and liabilities of the vestry except such as relate to the affairs of the Church or to ecclesiastical charities (*i*) and such as are expressly transferred to any other authority (*k*) the power and duty of appointing overseers and notifying their appointment and also the power of appointing and revoking the appointment of an assistant overseer (*l*) the same power of appointing trustees

(*g*) See 11 250 *et seq ante*

(*r*) See p 243 *ante*

(*s*) Local Government Act 1894 (56 & 57 Vict c 73) s 14 (*v*) As to rendering annual accounts of parochial charities to the parish meeting see *note* s 14 (*g*) and title CHARITIES Vol IV p 213

(*a*) As to the county council requiring by order the consent of the parish meeting of part of a parish to acts of the parish council in respect of that part see Local Government Act 1894 (56 & 57 Vict c 73) s 31 set out in title BURIAL AND CREMATION Vol III pp 495 496 The order does not require submission to or confirmation by the Local Government Board (Local Government Act 1894 (56 & 57 Vict c 73) s 40) As to the appointment of a committee to deal with a defined part of a parish see *note* (*p*) p 246 *ante*

(*b*) So far as the deal with parish property see pp 243 252 *ante* and generally see title LOCAL LAW

(*c*) See generally title EDUCATION Vol XII p 111

(*d*) 17 & 18 Vict c 112 see *note* (*s*) p 252 *ante* and generally see title LITERARY AND SCIENTIFIC INSTITUTIONS pp 195 *et seq ante*

(*e*) Local Government Act 1894 (56 & 57 Vict c 73) s 52 (1)

(*f*) As to grouping orders see p 240 *ante*

(*g*) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (4) (*v*) (7) (8) The trusteeship, management or control of an elementary school is not affected by any of the provisions of the Act (*ibid* s 66)

(*h*) *Ibid* s 19 (10) Note that the county council can only grant powers which are conferred on a parish council by the Act

(*i*) See *notes* (*c*) (*d*) p 251 *ante*

(*k*) Local Government Act 1894 (56 & 57 Vict c 73) s 15 (4)

(*l*) *Ibid* s 19 (5) and see pp 249 250 *ante*

of a charity in the place of overseers or churchwardens as is possessed by a parish council (*m*) the same powers as are conferred on a parish council in respect of the stopping or diversion of a public right of way or the declaring of a highway to be unnecessary and not repairable at the public expense and of complaint to a county council of a default of a rural district council (*n*) the right to receive through their chairman notice of draft schemes relating to parochial charities (*o*)

SECT. I  
The Parish

**529** All powers and duties transferred from an authority to the parish meeting and the adjustment of property and liabilities are subject to the general provisions relating to such transfers (*p*) and the provisions relating to the determination of questions in dispute are also applicable (*q*)

Regulations  
as to transfer

**530** The legal interest in all property which would be vested in a parish council if that existed (*r*) is vested in the body corporate of the chairman and overseers of the parish, subject to all trusts and liabilities affecting the same (*s*) and all persons concerned are required to make or concur in making such transfers as may be necessary (*t*)

Vesting of  
property

(c) *Powers where there is a Parish Council*

**531** Where a parish council exists in a parish the province of the parish meeting is limited to discussing and passing resolutions on the affairs of the parish and the exercise of such powers as are conferred exclusively upon all parish meetings (*u*)

Province of  
parish  
meeting

(iii) *Finance*

**532** The expenses of a parish meeting including the taking of a poll are payable out of the poor rate and the demand note must state in the form prescribed by the Local Government Board the proportion of the rate levied for such expenses (*v*) They are paid by the parish council where such exists and in other cases for the purpose of obtaining payment of such expenses the chairman has the same powers as a board of guardians have for the purpose of obtaining contributions to their common fund (*w*)

Expenses

(*m*) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (*r*) see p 252 *ante* title CHARITIES Vol IV p 264 as to accounts of charities see also p 261 *post*

(*n*) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (8) As to these matters see respectively p 249 *ante* and p 375 *post*

(*o*) Local Government Act 1894 (56 & 57 Vict c 73) s 14 (5) see also title CHARITIES Vol IV p 187

(*p*) Local Government Act 1894 (56 & 57 Vict c 73) s 61

(*q*) *Ibid* s 70

(*r*) See p 250 *ante*

(*s*) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (1) Questions relating to such vesting may be determined in the same way as in the case of a parish council (*ibid* s 10 (1) and see note (e) p 251 *ante*)

(*t*) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (1)

(*u*) As to which see p 257 *ante*

(*v*) Local Government Act 1894 (56 & 57 Vict c 73) s 11 (4) (5)

(*w*) *Ibid* s 11 (4) see p 212 *ante* The form of precept is prescribed by Order of Local Government Board 11th February, 1895 No 449 The

**SECT 1**  
**The Parish** A rate levied for defraying the expenses of the parish meeting including expenses under adoptive Acts (a) is limited to a maximum of sixpence in the pound in any local financial year (b)

**Accounts and audit** **533** The accounts of receipts and payments of the parish meeting their committees and officers are to be made up yearly to the 31st March in the form prescribed by the Local Government Board (c) and are audited by a district auditor in the same way as the accounts of a parish council (d)

Parochial electors may at all reasonable times without payment, inspect and take copies of and extracts from the accounts (e)

(iv) Polls

**Demand and conduct of poll** **534** Resolutions before a parish meeting may be subsequently submitted to a poll by ballot (f) of the whole electorate. In certain cases a poll may be demanded by any one parochial elector (a) but except in these cases a poll cannot be taken unless either the chairman assents or the poll is demanded at the meeting by at least five of the parochial electors (g) present or by a third of their number whichever number is less (h)

Each parochial elector has one vote on any question at any poll and no more or in case of an election one vote for each of any number of persons not exceeding the number to be elected (i)

The conduct of the poll is regulated by rules framed by the Local Government Board (j)

demand note for any rate levied for the purpose must state in the form prescribed by the Local Government Board the proportion of the rate levied for such expenses (Local Government Act 1894 (26 & 27 Vict c 73) s 11 (a)) As to rating generally see title RATES AND RATING

As to adoptive Acts see p 267 *ante*

(b) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (9) Where a parish continues in pursuance of an order of the county council to maintain its own highways the highway expenses are not to be deemed to be expenses of the parish meeting for this purpose of limitation (*ibid* s 8 (2))

(c) *Ibid* s 58 (1) see p 244 *ante* For the prescribed form see Order of Local Government Board 22nd March 1896

(d) Local Government Act 1894 (26 & 27 Vict c 73) s 58 (2) and see p 244 *ante*

(e) Local Government Act 1894 (56 & 57 Vict c 73) s 58 (4)

(f) *Ibid* s 2 (b) 48 (3)

(g) As to parochial electors see title ELECTIONS Vol XII p 191

(h) Local Government Act 1894 (26 & 57 Vict c 73) s 2 (7) Sched I Part 1 (i) The matters upon which a single elector can demand a poll are an application representation or complaint to a county or district council the appointment of a chairman for the year or of a committee or the delegation of any powers or duties to a committee or the approval of the acts of a committee the appointment of an overseer the appointment or revocation of the appointment or dismissal of an assistant overseer or a parish officer the appointment of trustees or beneficiaries of a charity the adoption of adoptive Acts the consent or refusal of consent to anything which cannot be done without consent the incurring of any expense or liability the place and time for the assembly of the parish meeting any other prescribed matter (*ibid*)

(i) Local Government Act 1894 (26 & 57 Vict c 73) s 2 (2). As to the right to use ballot boxes etc for a poll see *ibid* s 48 (6) (8) As to expenses see *ibid* s 48 (7) (8)

(j) *Ibid* s 48 (2) (8) The rules applicable are contained in the Parish

For the purpose of the polling the chairman of the parish meeting at which the poll is demanded is the returning officer unless he is unwilling or unable to act, in which case he may appoint some other person to act (*k*)

SECT 1  
The Parish  
Returning  
officer

## SECT 2—*The Vestry*

**535** The vestry is now almost entirely an ecclesiastical institution (*l*) the civil powers of the vestry in rural parishes having been transferred to the rural district councils and in nearly all urban parishes to the borough or urban district council by order of the Local Government Board (*m*) Where there has not been such a transfer the urban vestry has power to nominate and in many instances appoint and control the actions of the overseers and assistant overseers (*n*) to adopt and exercise powers under the Burial Acts 1852—1906 (*o*) to direct the custody of parish documents (*p*) to consider the basis of the county rate (*q*) to appoint a vestry clerk (*r*) to inspect accounts of charities (*s*) and to consent to the provision of parochial offices (*a*) or to provide them (*b*)

General  
position

Meetings (Polls) Order 1894 which apply where there is no parish council and the Parish Meetings (Polls) Order 189, Stat R & O Rev Vol IX Parish Council and Parish Meeting England pp 1 23 which apply where a parish council exists For the purpose of these Orders a parish which is situate in more than one administrative county is to be deemed to be wholly situate in the county containing the larger part of its population (Order 1894 r 1, Order 1895 r 18) If the poll be for part of a parish the rules apply as if the part were a parish (Order 1895 r 21)

(*k*) Parish Meetings (Polls) Orders 1894 and 1895 r 1 (1) (2) compare note (*n*) p 506

(*l*) See title ECCLESIASTICAL LAW Vol XI pp 102 *et seq* where the various kinds of vestries are described

(*m*) Under Local Government Act 1894 (56 & 57 Vict c 3) ss 35 34

(*n*) See the Poor Relief Act 1819 (59 Geo c 12) s 1, Poor Law Audit Act 1845 (11 & 12 Vict c 91) s 1, Union Assessment Committee Act 1862 (25 & 26 Vict c 103) s 32, Union Assessment Committee Amendment Act 1864 (21 & 22 Vict c 59) s 7, Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict c 41) ss 3 4, Poor Law Act 1879 (42 & 43 Vict c 54) s 17, General Order of Local Government Board 8th September 1903 art 3 (4) and see title RATES AND RATING

(*o*) See p 201 *ante* and title BURIAL AND CREMATION Vol III pp 440 note (*n*) 446 400

(*p*) Vestries Act 1818 (58 Geo 3 c 69) s 6

(*q*) County Rates Act 1872 (15 & 16 Vict c 81) s 13 and see title RATES AND RATING and p 309 *post*

(*r*) If and when the Vestries Act 1850 (13 & 14 Vict c 57) is applied As to the vestry clerk see title ECCLESIASTICAL LAW Vol XI p 460 For a recent case dealing with the duties and payment of salary of the vestry clerk see *R v Davies* *La parte Teake* (1911) 104 L T 778

(*s*) Charitable Trusts Amendment Act 1855 (18 & 19 Vict c 194) s 44 see title CHARITIES Vol IV p 273

(*a*) In parishes with a population exceeding 4 000 (Parochial Offices Act 1861 (24 & 25 Vict c 124) s 1)

(*b*) When the Vestries Act 1850 (13 & 14 Vict c 57) ss 4 5 is applied As to the annual list of parish property to be kept at the clerk's office see title CHARITIES Vol IV p 240 Vestries Act 1831 (1 & 2 Will 4 c 60) s 39 The details to be entered in the list are prescribed This provision is not affected by the Local Government Act 1894 (56 & 57 Vict c 73)



SECT 3  
The Urban  
District

Sect 3 — *The Urban District*

SUB SECT 1 — *The Urban District Council*

(1) *Continuation*

Effect of the  
Local Govern-  
ment Act  
1894

**536** In 1894 all urban sanitary authorities (c) were renamed 'urban district councils' and their districts urban districts except in the case of boroughs of which the styles and titles of the corporation and council remained unaffected (d)

The term 'urban district council' is a generic term including the council of every kind of urban district whether a borough or county borough or not (e)

Chairman

**537** The chairman of an urban district council other than a borough council (f) must be appointed at the annual meeting (g) to hold office for one year and to be chairman at all meetings at which he is present (h). The disqualifications of persons seeking office as urban district councillors apply equally to the office of chairman (i).

A woman married or unmarried is eligible for the office provided that she is a councillor (k). The chairman unless a woman or unless personally disqualified by statute is *ex officio* a justice of the peace for the county in which the district is situated (l) but before acting he must take the necessary oaths though these need not be repeated on his re-election on the expiration or other determination of a previous term (m).

Vice  
chairman

A council may appoint a vice chairman (n).

(c) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(d) Local Government Act 1894 (56 & 57 Vict c 3) s 21 (1) 84 (1) 85 (j) and see the Public Health Act 1870 (3 & 39 Vict c 50) s 6. As to the effect of the Act on improvement commissioners having harbour powers see the Local Government Act 1894 (56 & 57 Vict c 73) s 60. Urban district councils may sue and be sued in their corporate names (Public Health Act 1870 (38 & 39 Vict c 50) s 7). They may change their names with the sanction of the county council (Local Government Act 1894 (56 & 57 Vict c 73) s 50 (3) which practically superseded the Public Health Act 1870 (38 & 39 Vict c 50) s 311). As to transfers of stock on change of name see the Local Government (Stock Transfer) Act 1895 (58 & 59 Vict c 52).

(e) Local Government Act 1894 (56 & 57 Vict c 73) s 21 (3) see *Kirkdale Rural Board v Liverpool Corporation* [1904] 1 Ch 829. In this section of the present title the word 'council' is for the sake of brevity frequently used to denote 'urban district council'.

(f) As to borough see pp 293 *et seq* *post*.

(g) See title ELECTIONS Vol XII p 370. As to the appointment of a substitute see *ibid*. Local Government Act 1894 (56 & 57 Vict c 73) s 59 (1).

(h) Public Health Act 1870 (38 & 39 Vict c 50) s 199 Sched I (3) applied by Local Government Act 1894 (56 & 57 Vict c 73) s 59 (1).

(i) Local Government Act 1894 (56 & 57 Vict c 73) s 46 see p 263 *post*.

(k) This is not expressly enacted but it is recognised by the statute see Local Government Act 1894 (56 & 57 Vict c 73) s 22.

(l) As to justices of the peace see title MAGISTRATES pp 531 *et seq* *post*.

(m) Local Government Act 1894 (56 & 57 Vict c 73) s 22. Chairmen of District Councils Act 1896 (59 & 60 Vict c 22) s 1.

(n) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (2) see title ELECTIONS Vol XII p 376.

## SECT 3

## The Urban District

## Councillors

**538** The councillors are such persons being duly qualified (*o*) as are elected (*p*) as councillors by the parochial electors (*q*) of the parishes or wards in the urban district (*r*)

A person who ceases to hold the office of councillor is re-eligible for the office unless disqualified (*s*)

A councillor may by writing, resign his office on payment of the fine provided for non acceptance of office and the council must forthwith declare the office vacant (*t*) Non acceptance of office creates a casual vacancy (*u*)

A casual vacancy in the office of councillor is filled by election held in accordance with the Order of the Local Government Board (*a*) The person elected holds office for the residue of the term of office of the person whose place he takes

(11) *Qualifications and Disqualifications*

**539** In urban districts which are not boroughs there are no *ex officio* or nominated members of the council (*b*) A councillor must be a parochial elector (*c*) of a parish within the urban district or must have resided during the whole of the preceding twelve months in the district (*d*) Sex and marriage are not disqualifications (*e*)

Qualification  
of councillors

(*o*) See the text *infra* and p 264 *post*

(*p*) See title ELECTIONS Vol XII pp 361 *et seq* As to their term of office see *ibid* Local Government Act 1894 (56 & 57 Vict c 73) s 23 (6) District Councillors and Guardians (Term of Office) Act 1900 (63 & 64 Vict c 16) s 1 (1) (2<sup>1</sup>)

(*q*) As to parochial electors see title ELECTIONS Vol XII p 191

(*r*) Local Government Act 1894 (56 & 57 Vict c 73) s 23 (3) Their number and the manner in which they were allotted amongst the wards of the urban sanitary district remained unaltered in 1894 but their numbers and their apportionment amongst the wards (which wards may also be altered) may be regulated and determined by the county council (Local Government Act 1888 (51 & 52 Vict c 41) s 57 (1) (e) and see p 191 *post*)

(*s*) Urban District Councillors Election Order 1895 r 26 (1) and Sched V Stat R & O Lev Vol IV District Council England p 8 adapting the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7 made applicable by the Local Government Act 1894 (56 & 57 Vict c 73) s 48 (1) As to disqualifications see the text pp 264 *et seq post*

(*t*) Urban District Councillors Election Order 1895 r 26 (1) and Sched V adapting the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 6 made applicable by the Local Government Act 1894 (56 & 57 Vict c 73) s 48 (4) As to the fine on non acceptance of office see p 264 *post*

(*u*) Urban District Councillors Election Order 1895 r 26 (1) and Sched V adapting the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 40 made applicable by the Local Government Act 1894 (56 & 57 Vict c 73) s 48 (4) As to the course adopted when more than one casual vacancy is filled at the same election and the time within which the election should be held see *ibid* and title ELECTIONS Vol XII p 314 An election is not necessary to fill a casual vacancy occurring within six months before the ordinary day of retirement from the office in which the vacancy occurs but it must be filled at the next ordinary election (Local Government Act 1894 (56 & 57 Vict c 73) s 48 (4))

(*a*) See title ELECTIONS Vol XII p 374

(*b*) Local Government Act 1894 (56 & 57 Vict c 73) s 23 (1)

(*c*) As to which see title ELECTIONS Vol XII p 191 and compare p 241 *ante*

(*d*) Local Government Act 1894 (56 & 57 Vict c 73) s 23 (2) All other statutory enactments whether in general local or personal Acts are repealed (*ibid*) As to what constitutes residence see title ELECTIONS, Vol XII p 177 note (*f*)

(*e*) Local Government Act 1894 (56 & 57 Vict c 73) s 23 (2)

## SECT 3

**The Urban District**

Acceptance  
of office by  
qualified  
person

Elected  
person cannot  
act before  
making  
declaration

Penalty

**540** Every qualified person who has been elected, or been deemed to be re-elected, to the office of urban district councillor must unless exempt as hereinafter stated, either accept the office by making and subscribing the statutory declaration within one month after notice of being so elected or of being deemed to be re-elected or pay the prescribed fine (*f*)

A person elected or deemed to be elected as councillor must not act in the office except in administering the declaration until he has made and subscribed the prescribed declaration before two members of the council or the clerk to the council or in case of his absence from the United Kingdom before a British consul and such persons are authorised to receive the declaration

The penalty for acting without having made the declaration is a fine not exceeding £20 for each offence recoverable by action (*j*)

Disqualifica-  
tions under  
Local  
Government  
Act 1894

**541** The following persons are disqualified from being elected or being members of or chairmen of parish or district councils (*h*) infants aliens those who within twelve months before their election or since election including both the nomination and the poll (*i*) have received union or parochial relief (*k*) those who within five years before election or since election including both the nomination and the poll (*l*) have been convicted either on indictment or summarily of any crime and been sentenced to imprisonment with hard labour without the option of a fine or to any greater punishment and have not received a free pardon persons who within the said periods have been adjudged bankrupt, unless and until the adjudication is annulled or a discharge has been granted with a certificate (*m*) that the bankruptcy was caused by misfortune without any misconduct on their part (*n*) or have made a composition or arrangement with their creditors unless

(*f*) Urban District Councillors Election Order 1898 r 26 (1) and Sched V adapting the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 34 made applicable by the Local Government Act 1894 (56 & 57 Vict c 73) s 48 (4) Penalties are imposed for non acceptance see *ibid*

(*i*) Urban District Councillors Election Order 1898 r 26 (1) and Sched V adapting the Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 35 41 239 made applicable by the Local Government Act 1894 (56 & 57 Vict c 73) s 48 (4) If made before a British consul it must forthwith be sent to the clerk of the council (Municipal Corporations Act 1882 (45 & 46 Vict c 50) for persons who are exempt from serving in the office see Urban District Councillors Election Order 1898 r 26 (1) and Sched V and the list on pp 231 295 for the notes thereto indicating how far they apply to the office of councillors

(*h*) Also applicable to boards of guardians (Local Government Act 1894 (56 & 57 Vict c 73) s 46 (1))

(*k*) Local Government Act 1894 (56 & 57 Vict c 73) s 75

(*j*) As to this see title ELECTIONS Vol VII pp 112-114 As to what constitutes union or parochial relief see title Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) ss 56-58 and see title POOR LAW

(*l*) Local Government Act 1894 (56 & 57 Vict c 73) s 5 (2)

(*m*) As to this see title BANKRUPTCY AND INSOLVENCY Vol II pp 90 *et seq* Compare the cases under the Municipal Corporations Act 1882 (45 & 46 Vict c 50) and see p 301 *post*

(*n*) Local Government Act 1894 (56 & 57 Vict c 73) s 46 (1) (c) (4)

## SECT 3

## The Urban District

and until their debts have been paid in full (o), this latter provision including an administration order providing for the payment of less than the full amount of their debts under the statutory provisions (p) relating to small bankruptcies (q) and also deeds of arrangement (r) persons holding any paid office under the council (s) persons concerned in any bargain or contract entered into with the council, or participating in the profits of any such bargain or contract or of any work done under the authority of the council (t) subject however to certain limitations (u)

**542** Acting or voting in the office during disqualification is an offence punishable by fine on summary conviction (b) Speaking at a meeting of the council, but without voting renders the offender liable to the penalty (c) and the liability does not cease although the period in which his election may be challenged has expired (d)

**543** A vacancy is created by a councillor becoming disqualified during his term of office or by his absence from council meetings for more than six months consecutively, except in case of illness or for some reason approved by the council Upon such event the council must declare the office vacant and signify the same by notice signed by three members and countersigned by the clerk, and notified as the council may direct (e)

(1) Local Government Act 1894 (36 & 37 Vict c 73) s 46 (1) (c) (4) but see title BANKRUPTCY AND INSOLVENCY Vol II p 269

(1) See title BANKRUPTCY AND INSOLVENCY Vol II pp 291—301

(2) *Bratfield v Cheltenham Guardians* [1906] 2 Ch 511

(3) Under the Deeds of Arrangement Act 1881 (50 & 51 Vict c 57) s 6 *Corrigan v Allison* (1900) 64 J P 178

(4) Local Government Act 1894 (36 & 37 Vict c 73) s 46 (1) (3) If payment made to a medical practitioner under the Infectious Disease (Notification) Act 1889 (52 & 53 Vict c 72) does not disqualify him (*ibid* s 11) and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION As to disqualification through being the paid clerk of a joint hospital committee see *Greville Smith v Tomlin* (1911) 101 T T 316

(5) Local Government Act 1894 (36 & 37 Vict c 73) s 46 (1) (e)

(a) The disqualification by reason of being interested in bargains or contracts does not attach where the interest is only in the sale or lease of lands or in loans of money to the council or in any contract for the supply from land of which the person is owner or occupier of stone gravel or other material for making or repairing highways or bridges or in the transport of materials for the repair of roads or bridges in his immediate neighbourhood or in any newspaper in which any advertisement relating to the affairs of the council is inserted or in any contract with the council as a shareholder in any joint stock company but in this last exception he may not vote at any meeting of the council on any question in which the company is interested except that in the case of a water company or other company established for the carrying on of works of a like public nature this prohibition may be dispensed with by the county council (*ibid* s 46 (2))

(b) *Ibid* s 46 (9) As to proceedings to be taken against persons filling and exercising municipal offices unlawfully see Municipal Offices Act 1910 (9 Ann c 25) and title CROWN PRACTICE Vol X pp 130 *et seq*

(c) *Charlesworth v Rudgard* (1835) 4 I J (ex) 89

(d) *De Souza v Cadden* [1891] 1 Q B 687 C A

(e) Local Government Act 1894 (36 & 37 Vict c 73) s 46 (6) (7) This does not apply to boroughs (*ibid*) The council ought not to vacate the office without giving the holder an opportunity of explaining his absence see *Richardson v Methley School Board* [1893] 3 Ch 510 see also *R v Hutton* *Ex parte Hodgson* (1911) 70 J P 335

## LOCAL GOVERNMENT

206

### Sect. 4. The Urban District

Disqualifica-  
tion on  
certain  
convictions  
General  
description  
of powers and  
duties

**544** Disqualification for holding public office, which includes the office of district councillor, is imposed by, or may be imposed under, certain statutes in the case of persons found guilty of corrupt practices and other offences against election law (f)

#### (iii) Powers and Duties

**545** The urban district council within its district has the powers and duties of sanitary authority (g) and highway authority (h), and exercises such as were formerly in the hands of other persons under local Acts (i). The county council may also delegate certain powers to the urban district council (l) or appoint the latter as its agent in the transaction of administrative business in matters affecting the urban district (l) and may alter the area over which a council has jurisdiction (m).

Powers trans-  
ferred from  
justices

**546** The urban district council has the powers duties and liabilities of justices out of sessions in relation to the following matters when arising within a county district namely the licensing of gaming masters (n) and of dealers in game (o) the grant of pawn brokers certificates (p) and of licences for passage brokers and emigrant runners (q) the abolition of and the alteration of days to holding fairs (r) the execution as the local authority of the Acts relating to petroleum (s).

Powers trans-  
ferred from  
quarter  
sessions

**547** The urban district council has also the powers duties and liabilities formerly exercised by and imposed upon quarter sessions

(f) Corrupt and Illegal Practices Prevention Act 1855 (46 & 47 Vict c 31) ss 4 6 (3) 35 (a) 45 (4) Municipal Elections (Corrupt and Illegal Practices) Act 1881 (47 & 48 Vict c 10) s 2 3 8 (2) 23 25 (4) 35 36 Public Bodies (Corrupt Practices) Act 1889 (52 & 53 Vict c 63) s 2 See further title ELECTIONS Vol XII p 224 and see title CRIMINAL LAW AND PROCEDURE Vol IX pp 481 *et seq*

(g) Including the power to make bye laws see title PUBLIC HEALTH AND LOCAL ADMINISTRATION The powers under the Public Health Acts are cumulative see the Public Health Act 1875 (38 & 39 Vict c 55) s 341

(h) See title HIGHWAYS STREETS AND BRIDGES Vol XVI p 21

(i) Public Health Act 1875 (38 & 39 Vict c 55) s 10 except under Acts for the conveyance of rivers (*ibid*) see title WATERS AND WATERSHEDS

(k) Local Government Act 1888 (51 & 52 Vict c 41) s 28 (2)

(l) Local Government Act 1894 (56 & 57 Vict c 13) s 64

(m) Local Government Act 1886 (51 & 52 Vict c 41) s 57 and see p 201 *post*

(n) See title AGRICULTURE Vol I p 277 For the provisions relating to the effect of a transfer of power and duties by the Local Government Act 1894 (56 & 57 Vict c 73) see *ibid* s 61 As to settling questions of transfer see *ibid* s 70

(o) See title GAME Vol XV p 200

(p) See title PAWNS AND LENDING

(q) See title SHIPPING AND NAVIGATION

(r) See title MARKETS AND FAIRS

(s) Local Government Act 1894 (56 & 57 Vict c 73) s 27 (1) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION The powers in respect of infant life protection were taken out of this list and vested in the board of guardians by the Infant Life Protection Act 1897 (60 & 61 Vict c 57) s 10 and Schedule repealed and re-enacted by the Children Act 1908 (8 Edw 7 c 61) s 10 see title INFANTS AND CHILDREN Vol XVII p 158

## PART I.—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

in relation to the licensing of knackers yards within the county district (d)

SECT 3  
The Urban  
District

**548** The council also has, or may acquire, powers under statutes relating to a variety of matters dealing with the interests of its district and the inhabitants These are discussed elsewhere (a)

Various  
statutory  
powers

**549** The Local Government Board has powers upon the application of the council or any representative body within the district to make an order conferring on the council or on such other representative body all or any of the following matters the appointment of overseers and assistant overseers the revocation of the appointment of the latter any powers duties or liabilities of overseers and any powers duties or liabilities of a parish council and may apply the provisions of the Local Government Act 1894 (b) relating to these matters The order may extend to the whole or to specified parts of the area of the district and may make the necessary provisions for giving effect to it it must make necessary provisions for preserving the existing interests of paid officers It cannot alter the incidence of any rate (c)

Power of  
Local  
Government  
Board to  
order  
powers

If the order confers any of the powers relating to overseers it or a subsequent order may confer on the council or representative body the powers of the vestry under the Poor Rate Assessment and Collection Act 1869 (d) relating to the rating of small tenements (e)

**550** Where in the urban district (f) or part of it an authority is constituted under any of the adoptive Acts (g) the council may resolve that the powers duties property debts and liabilities of that authority shall be transferred to the council as from the date specified in the resolution Thereupon the transfer is effected and the council becomes the successor of that authority (h)

Process under  
adoptive Acts

An adoptive Act cannot be adopted for any part of the district without the approval of the council (i)

(d) Local Government Act 1894 (56 & 57 Vict c 73) s 2 (2) see title PUBLIC HEALTH AND LOCAL ADMINISTRATION Rates payable in respect of the matters transferred from the justices and quarter sessions are payable to the council (Local Government Act 1894 (56 & 57 Vict c 73) s 27 (3))

(a) See for example list of cross references given on pp 233—236 *ante* For many of these purposes the council is authorised to purchase or hire land as to which see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 163 *et seq*

(b) Local Government Act 1914 (56 & 57 Vict c 13) s 33 (1) (5) As to overseers see p 249 *ante* and title POOR LAW As to powers of a parish council see pp 216 248 *ante*

(c) Local Government Act 1894 (56 & 57 Vict c 73) s 33 (3) (4) The order may also make provisions for securing proper representation on the body of trustees of charities ( *ibid* s 30 (2) (1) ) as to which see title CHARITIES Vol IV pp 200 *et seq*

(d) 32 & 33 Vict c 41 ss 3 4

(e) Local Government Act 1894 (56 & 57 Vict c 73) s 34 see title RATES AND RATING

(f) The area of a county borough is an urban district within the meaning of this provision (*Kirkdale Burial Board v Liverpool Corporation* [1904] 1 Ch. 529)

(g) For these see p 257 *ante*

(h) Local Government Act 1894 (56 & 57 Vict c 73) s 62 (1)

(i) *Ibid* s 62 (2)

**SECT 3**  
**The Urban District**

Exercise  
of powers  
outside  
district  
Failure to  
act

**551** The council may, with the consent of the council of the adjoining district execute and do in the adjoining district any works and things that it may do in its own district, on such terms as to payment and otherwise as the two councils may agree Contributions so agreed to be paid are deemed to be expenses incurred by the council in the execution of works in its district (*k*)

**552** In the event of an urban district council other than a borough council being unable to act either from failure to elect or otherwise the county council may order elections to be held and may appoint persons to form the urban district council until an effective council is elected (*l*)

(iv) *Contracts*

In general

**553** The contracts of an urban district council are in general governed by the law relating to the contracts of corporate bodies (*m*) but special statutory requirements must be observed when the council is entering into contracts as it is empowered to do (*n*) necessary for the purpose of exercising its powers and performing its duties as an urban sanitary authority under the Public Health Acts (*o*)

Contracts  
under Public  
Health Act  
over £50  
(1) to be  
under seal

**554** The statutory requirements under the Public Health Act 1875 (*p*) are the following —

If the value or amount of the contract exceeds £50 the contract must be in writing and sealed with the common seal of the council (*q*) This is an imperative provision (*r*) and relief cannot be obtained in equity on the ground of part performance or otherwise (*s*) but the other contracting party need not also contract under seal (*t*)

The contract to which the statutory requirements are applicable is such as is necessary for the execution of the powers and duties of the statutes (*u*) so that in agreement not under seal to compromise a dispute arising out of a contract under seal is enforceable (*a*) as also is a like agreement compromising an action (*b*)

(*i*) Public Health Act 1875 (38 & 39 Vict c 55) s 28. The right to exercise the above power does not dispense with any conditions or requirement made by the statutory provision under which the works are being executed (*Joint v. Crenau and C. Lion Bay Joint Water Supply Board* [1895] 2 Ch 605 C A per Nourse J at p 609)

(*l*) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (*o*) Local Government (Elections) Act 1896 (59 & 60 Vict c 1) which is still in operation

(*m*) See title CORPORATIONS Vol VIII pp 349—366

(*n*) Public Health Act 1875 (38 & 39 Vict c 55) s 13

(*o*) *Ibid* s 14. These requirements apply only to contracts made by an urban authority (*ibid*) which includes borough councils As to the Public Health Acts generally see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*p*) 38 & 39 Vict c 55

(*q*) *Ibid* s 174 (1)

(*r*) *Young & Co v Royal Leamington Spa Corporation* (1883) 8 App Cas 517 *Hunt v Wimbledon Local Board* (1885) 4 C P D 49 C A see also *Frend v Dennett* (1861) 5 L T 73

(*s*) *Frend v Dennett supra*

(*t*) *Brooks Jenkins & Co v Jersey Corporation* [1902] 1 K B 601

(*u*) That is the Public Health Acts See title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*a*) *Williams v Barmouth Urban District Council* (1897) 77 L T 383 C A

(*b*) *A G v Gaskill* (1882) 7 Ch D 537 As to compromise of a highway prosecution or indictment see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 115

Further, the contract must be such that in the contemplation of the parties its value or amount exceeds or will exceed the limit of £50 (c)

Although it is essential that the contract itself should be sealed (d) a contract which should be but is not under seal is not altogether void and becomes enforceable if ratified under seal (e)

# SECT 3 The Urban District

Effect of  
contract not  
under seal

The council is not obliged to set up non compliance with the statutory provisions as a defence in an action brought upon it but such defence if intended must be specially pleaded (f) For this reason the court may refuse to grant a *certiorari* to bring up and quash a resolution to pay for work which has been done under an unsealed contract (g) and an action which is brought by a council to recover the expenses of paving private streets cannot be successfully defended on the ground that the expenses were paid under a contract which ought to have been but was not under seal (h)

**555** The contract must specify the work materials matters or things to be furnished had or done the price to be paid a time limit and a penalty for not duly performing the contract (i) The provision as to the insertion of a penalty clause is directory and not obligatory even if the whole of this provision is not merely directory (j)

(ii) Matters  
to be speci-  
fied

A contract under which the contractors are to be paid for their work of paving etc streets when the authority has collected the contributions from the frontagers assumes that the authority will take all necessary steps for collecting such contributions and it cannot escape payment on the ground that it is unable to collect the contributions owing to the statutory notices given by it being invalid (l)

**556** If the contract is for the execution of works the council must obtain from its surveyor an estimate in writing of the probable expense of executing the work in a substantial manner and of the annual expense of maintaining it and a report as to the

(iii) Esti-  
mate and  
report

(c) *Luton v Tasker* (1881) 1 Q B D 529 C A *Wood v Lut Ham Urban District Council* (1907) 71 J P 129 C A *Spencer Whitley and Underhill v Southall Norwood Urban District Council* (1905) 69 J P 508

(d) See *Bosson v Althincham Urban District Council* (1903) 67 J P 397 C A *Tunbridge Wells Improvement Commissioners v Southborough Local Board* (1885) 60 I T 112

(e) *Brooks Jelins & Co v Torquay Corporation* [1902] 1 K B 601 *Mellish v Slurley Local Board* (1885) 14 Q L D 911 reversed on other ground (1885) 14 Q B D 446 C A See further as to liability on contracts not under seal title BUILDING CONTRACTS JOINTERS AND ARCHITECTS Vol III p 288

(f) R S C Ord 19 r 10 20

(g) *L v Norwich Corporation* (1882) 46 J P 308

(h) *Bournemouth Commissioners v Watts* (1884) 14 Q L D 81 see also *I v Irest* (1850) 16 Q B 32

(i) Public Health Act 1875 (38 & 39 Vict c 55) s 174 (2)

(j) See *Southill Upper Urban Council v Wakefield Rural Council* [1905] 2 Ch 516 C A It had previously been held by a Divisional Court that the absence of a penalty clause rendered the contract unenforceable by action *British Insulated Wire Co v Prescott Urban District Council* [1895] 2 Q B 463 On appeal no judgments were delivered the Local Government Board having intimated that they would sanction the payment (*ibid* p 538) The decision must now be taken as overruled

(l) *Worthington v Sullow* (1862) 2 B and S 508 As to the paving of streets, see title HIGHWAYS SILETS AND BRIDGES Vol XVI pp 215 et seq



**SECT 3**  
**The Urban**  
**District**

most advantageous way of contracting whether by contracting for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise (m) The provision is directory only and the authority is liable under the contract although there has been no estimate nor report (n) and where on the completion of the work it would not be maintained out of the rates or under the statute, no estimate nor report is necessary (o) Where then the work may be both executed and repaired under the statutory provisions there should be an estimate and report on both execution and repair but where under such provisions the work may be only executed or only repaired the estimate and report will extend only to the work which is within the statute (p)

(iv) Tender  
Contracts  
of £100 and  
over

**557** Tenders must be invited by public notice for the execution of any contract of the value or amount of £100 or upwards The notice must be at least a ten days notice expressing the nature and purpose of the contract and the authority must require and take sufficient security for its due performance (q) This provision is also only directory and has nothing to do with the contractor or the validity of his contract (r)

The security generally takes the form of a guarantee by sureties and in this case the common law principles governing the rights of the surety apply (s)

(v) Effect of  
contract

**558** The contract if duly and properly executed is binding on the authority and its successors and on all parties thereto and their executors administrators successors and assigns but the authority may compound with any person for any sum it thinks proper in respect of any penalty arising from non performance of the contract whether the penalty is in the contract itself or in a bond (t)

(m) Public Health Act 1875 (36 & 39 Vict c 55) s 174 (3)

(n) *Novell v Worcester Corporation* (1854) 9 Exch 401 *Cunningham v Wolverhampton Local Board of Health* (1891) 1 L & B 101 111

(o) *Cunningham v Wolverhampton Local Board of Health supra*

(p) *Ibid* at p 114

(q) Public Health Act 1875 (36 & 39 Vict c 55) s 174 (4) By submitting plans and estimates the authority does not guarantee that the work can be executed according to such plans and estimates (*Thorn v London Corporation* (1876) 1 App Cas 120) and see title BUILDING CONTRACTS ENGINEERS AND ARCHITECTS Vol III p 307 As to the position of the contractor and the architect of the local authority under a contract see *ibid* pp 201 211 212 246 256

(r) See *Young & Co v Royal Leamington Spa Corporation* (1880) 6 App Cas 517 528

(s) See titles BUILDING CONTRACTS ENGINEERS AND ARCHITECTS Vol III pp 249 *et seq* GUARANTEE Vol XV pp 476 *et seq* The courts will not always enforce the term of the contract of an authority which requires disputes to be submitted to one of their own officers see *Nuttall v Manchester Corporation* (1892) 8 T L R 513 *Pickthall v Merthyr Tydfil Local Board* (1886) 2 T L R 805 and see *Leeman (G) & Sons v Chester Rural Council* [1911] W N 54 C A (stay refused where contract provided that disputes should be referred to the engineer of the local authority) and titles ARBITRATION Vol I p 453 BUILDING CONTRACTS ENGINEERS AND ARCHITECTS Vol III p 267

(t) Public Health Act 1875 (36 & 39 Vict c 55) s 174 (5) As to when sums can be claimed as liquidated damages instead of penalties see *Jau v Redditch Local Board*, [1892] 1 Q B 121 C A and see title DAMAGES Vol X pp 328 *et seq*

## (v) Compensation

## SECT 3

## The Urban District

## Under Public Health Acts

**559** Under the Public Health Acts (*u*) the necessity for arbitration may arise for the purpose of assessing compensation payable to a person (*a*) who has sustained damage in the execution by the council of its statutory powers (*b*) or for the purpose of determining all such matters as by the statutes are specially authorised or directed to be so determined (*c*)

As a rule an action will not lie in respect of matters for which compensation is available (*d*)

The damage (*e*) in respect of which compensation is payable must be such as would have been actionable but for the authority of the statute (*f*) It must arise from the execution of the works (*g*), and

Nature of damage

(*u*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*a*) He must have been entitled to the property affected at the time of the execution of the works (*Helmire v East Ham Local Board* (1895) *Times* 13th December subsequently affirmed on appeal) or have the right to claim compensation duly assigned to him (*Dawson v Great Northern Rail Co* [1905] 1 K B 260 C A)

(*b*) Public Health Act 1910 (38 & 39 Vict c 55) ss 181 308 and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 163 Where under similar provisions in a local Act costs were not mentioned it was held that full compensation included the costs of the application to the justices (*Huddersfield Corporation v Shaw* (1890) 4 J P 714)

(*c*) Public Health Act 1875 (38 & 39 Vict c 55) s 179 1 or the referred matters see *ibid* ss 22 52 61 150 155 28 328 and as to the procedure on arbitration see *ibid* ss 179 180 Arbitration Act 1889 (52 & 53 Vict c 49) s 24 and the following cases *Re Gifford and Bury Town Council* (1886) 20 Q B D 368 *Hollisworth v Barsham* (1862) 2 B & S 450 *sub nom Hollisworth v Wilson* (1863) 4 B & S 1 Ex Ch *Re Swinton Urban District Council and Uppohn* (1899) *Times* 19th January *Davis v Whiteley Urban District Council* (1899) 63 J L 219 C A *Leake v Inceley Local Board* (1887) 51 L T 882 *Re Barnett and Eccles Corporation* (1901) 65 J P 757 *Re Coudell* (1853) 52 L J (CH) 216 *Re Clark and Bath Corporation* [1884] W N 121 *Chesterfield Corporation and Brampton Local Board* (1886) 50 J P 824 *Re Walker and Bekeham District Local Board* (1884) 50 L T 207 *Imbridge Wells Local Board v Akroyd* (1880) 5 Ex D 199 C A The arbitrators have no power to determine the question of liability that should be determined in an action on the award (*Brierley Hall Local Board v Pearshall* (1854) 9 App Cas 595) but they may determine the facts which show damage *e.g.* the fact that meat which has been served as unsound was sound in a case where the proceedings before the justices were dismissed for want of form (*Walshaw v Brighouse Corporation* [1899] 2 Q B 256 C A) and see title FOOD AND DRUGS Vol XV p 41 See also generally title ARBITRATION Vol I pp 437 *et seq* 492 As to stamp see *ibid* pp 447 470

(*d*) See cases cited in titles ACTION Vol I p 8 COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 31 *et seq* As to when an action is the proper remedy see *ibid* pp 32 44 and as to when an injunction may be obtained instead of taking proceedings for compensation see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 44 INJUNCTION Vol XVII p 224

(*e*) As to damages generally see title DAMAGES Vol X pp 301 *et seq*

(*f*) *Hall v Bristol Corporation* (1867) L R 2 C P 39 *Rhodes v Airedale Drainage Commissioners* (1876) 1 C P D 402 C A *Herring v Metropolitan Board of Works* (1865) 34 L J (M C) 224 *Ossford v Dover Harbour Board* (1898) *Times* 2nd April *Burgess v Northwich Local Board* (1880) 6 Q B D 264 As to the same principle under the Lands Clauses Consolidation Acts see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 44 *et seq* and the cases there cited

(*g*) See *Ossford v Dover Harbour Board* (1898) *Times* 2nd April *per WILLS J* Merely giving a notice of intention to execute work *e.g.* to lay a sewer through private lands acted upon by the claimant does not entitle him

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not merely from their use after construction (h) and it must arise from the execution of the powers under the Public Health Acts (i), and not under other statutory or common law powers (j) It must further be the result of a lawful exercise of the statutory powers (j) and when it arises from something done by the council which it is not authorised to do the remedy is by action and not by a claim for compensation (l)

Character  
damage

The damage sustained need not be damage to land or an interest in land (m) but it includes any species of damage suffered by the execution of powers (n) Prospective or future, as well as present, damage may generally be included (o)

SUB SECT 2 Officers

(1) The General

Compulsory  
officers

**580** Urban district councils must appoint a medical officer of health (p) a surveyor an inspector of nuisances (q) a clerk and a treasurer, unless such an officer has been appointed under the powers of a local Act in which case he may receive additional remuneration and no second appointment need or can be made under the Public Health Acts (r)

Beyond these officers the councils must appoint or employ such assistants collectors and other officers and servants as may be necessary for the proper execution of the Public Health Acts (s)

to compensation for expenses so incurred (*Davis v Wilney Urban District Council* (1891) 63 J P 29 C A)

(h) But see *Durant v Trianlome Urban Council* [1897] 2 Ch 291 305 C A where it was assumed that compensation would be payable for the damage caused by the silting up of a stream by the discharge of sewers and see title SEWERS AND DRAINS In *Hilton v Colwyn Bay and Colwyn Urban Council* [1908] 1 K B 321 C A the compensation claimed was for depreciation of land by reason of the contemplated user of a sewage pumping station and reservoir on land other than but in proximity to the claimant's land and it was held that the compensation was not awardable see further title ACTION Vol I p 14 and the cases there referred to

(i) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(j) *Burgess v Northwich Local Board* (1880) 6 Q L D 264 *Roberts v Falmouth Sanitary Authority* (1885) 52 J L 111

(l) See *Cassford v Dover Harbour Board* (1898) *Times* 2nd April per WILLS J

(m) *R v Darlington Local Board of Health* (1865) 6 B & S 562

(n) As is the case under the Lands Clauses Consolidation Acts see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 1 *et seq*

(o) As to costs incurred in successfully resisting proceedings before justices see title FOOD AND DRUGS Vol XV p 41 As to damage sustained by altering the level of a street when executing paving works see title HIGHWAYS FREEWAYS AND BRIDGES Vol XVI p 67

(p) *Hitley v Tidmorden District Local Board of Health* (1844) 14 L J (C P) 19 and see *Colac Manufacturing Co v Summerfield* [1893] A C 151 P C *Re Breuer and Hankins Contract* (1899) 80 I T 127 C A

(q) Districts may be united for the appointment of such officer see p 210 *post*

(r) See p 277 *post*

(s) Public Health Act 1875 (38 & 39 Vict c 55) s 189 The treasurer must be a distinct person from the clerk (*ibid* s 192) A banking association cannot be treasurer (*Re West of England and South Wales District Bank Ex parte Swansea Friendly Society* (1849) 11 Ch D 768)

(t) Public Health Act 1875 (38 & 39 Vict c 55) s 189 As to the freedom of officers from personal liability see *ibid* s 265 As to the protection of public officers acting as such see title LIMITATION OF ACTIONS p 176 *ante* PUBLIC AUTHORITIES AND PUBLIC OFFICERS

**561** Subject to the general principles of law regulating contracts (*t*) and to the special provisions affecting contracts above a certain value entered into by an urban authority under the Public Health Acts (*u*) no particular form of appointment is necessary (*a*) but it should be recorded in the minutes

If the appointment be under seal a 10s impressed stamp is necessary (*b*) but no stamp is otherwise required (*c*)

**562** The duties and conduct of the medical officer of health and of those inspectors of nuisances whose salaries are partly paid by the county council (*d*) are regulated by orders of the Local Government Board (*e*) In the case of other officers and servants, the urban district council may make regulations which do not require confirmation to control their duties and conduct (*f*)

**563** The salaries wages or allowances to be paid to officers and servants are in the discretion of the council (*g*) except where any portion of the salary is payable out of monies voted by Parliament (*h*) The council cannot grant gratuities out of rates (*i*)

An action will lie by the officer against the council for arrears of remuneration but the judgment in the absence of goods on which to levy execution is enforceable by mandamus to levy a rate and not against the individual members of the council (*l*)

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The Urban  
District  
Method of  
appointment

Duties.

Remunera-  
tion

(*i*) See titles CONTRACT Vol VII pp 52 *et seq* / CONDITIONS Vol VIII pp 352 *et seq* See also *Dyke v St Pancras Poor Law Guardians* (1852) 27 I T 342 *In re B Thral Green (Guardians)* (1874) I R 9 (P 91)

(*u*) See p 265 *ante*

(*a*) See *Smith v Hirst* (1870) 23 I T 600 *St v Clift v School Board* (1881) 14 Q B D 500 *R v Foully Ex parte Williams* [1899] 1 Q B 396 *R v Greve* (1852) 17 Q B 793 *Idruts v Druitt* (1861) 18 C B (N S) 48 *Smart v West Ham Union Guardians* (1855) 10 Lach 861 See further as to medical officers of health p 215 *post* and to inspectors of nuisances p 277 *post*

(*b*) Stamp Act 1891 (54 & 55 Vict c 59) s 12 and Sched I *Idem*

(*c*) The stamp duties formerly charged by the Stamp Act 1850 (13 & 34 Vict c 37) were abolished by the Customs and Inland Revenue Act 1875 (38 & 39 Vict c 23) s 14

(*d*) See pp 215 *216 post*

(*e*) Order of Local Government Board 23rd March 1891 See further as to medical officers of health note (*l*) p 255 *post* and to inspectors of nuisances p 271 *post*

(*f*) Public Health Act 1855 (18 & 19 Vict c 55) s 169

(*g*) *Ibid* Salaries accrue from day to day and are apportionable (Appointment Act 1870 (33 & 34 Vict c 55) ss 1, 2)

(*h*) *See* in the case of medical officers of health and sometimes inspectors of nuisances as to which see pp 255 *257 post* As to extra remuneration see p 274 *post*

(*i*) See *Ex parte Mellish* (1863) 6 I L 47 but a payment for extra work beyond the contractual duties was held to be legal (*R v Gloucester Corporation* (1851) 23 J P 709) For compensation for loss of office see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(*k*) There is no direct authority that such an action lies but it is the inference to be drawn from *Kendall v King* (1856) 17 C B 463 *Hall v Taylor* (1855) E B & L 107 see also *Lush v Beavan* (1819) 1 H & C 500 *Bush v Martin* (1863) 33 L J (Ex) 17 Previous decisions had held that under similar conditions the appointment of an officer did not constitute a contract upon which an action for debt would lie for salary the proper remedy being mandamus or an action on the case (*Beggs v Fearnse* (1851) 10 C B 34 *Adams v Ircton Corporation* (1852) 12 C B 109, *Smart v West Ham Union Guardians* (1855) 10 Lach 861)

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**The Urban**  
**District**  
**Removal.**

**564** Officers and servants appointed under the Public Health Acts (*l*) are removable by the council at pleasure except where the officer is paid in part out of moneys voted by Parliament (*m*). A resolution to dismiss an officer is not a resolution to rescind that by which he was appointed so as to require the formalities of a bye law relating to rescinding (*n*). In exercising the power of dismissal the council need not give any notice nor assign any reason (*o*).

**Disabilities**

**565** Such officers and servants cannot in any way be concerned or interested in any bargain or contract made with the authority appointing them for any of the purposes of the Public Health Acts (*p*). Such a prohibited contract is void (*q*) and payments under it are illegal (*r*).

**Prohibited**  
**Contract**

**Contracts**  
**excepted**  
**from**  
**prohibition**

Certain contracts subject to statutory conditions being complied with are excepted namely contracts made with the council for the sale purchase lease or hire of any lands rooms or offices and contracts made with the council by a joint stock company in which the officer is a shareholder (*s*).

**Extra**  
**services.**

The above provisions do not exclude an officer from receiving remuneration for services beyond those which he was originally engaged to perform (*t*) provided the remuneration is of proper amount and character (*a*).

(*l*) Public Health Act 1875 (38 & 39 Vict c 55) s 159. As to the effect of such a power see *R v Dairlington School (Governors)* (1844) 6 Q B 657. *Ex Ch Re Teather and Looe Law Commissioners* (1850) 19 I J (M C) 10. *Hyman v Rugby School (Governors)* (1854) L R 18 Eq 28. *Ex parte Richards* (1878) 3 Q B D 365.

(*m*) See note (*h*) p 213 ante.

(*n*) *Ex parte Richards supra*. S C sub nom *R v Jones* 42 J P 614 dissenting from *R v Wierham and Denbigh Roads (Trustees)* (1836) 5 Ad & El 581.

(*o*) *Wood v East Ham Urban District Council* (1901) 71 J P 129 C A.

(*p*) Public Health Act 1875 (38 & 39 Vict c 55) s 193. For the penalties for breach see *ibid*. This provision applies to the officers of rural district councils. See further Public Bodies Corrupt Practices Act 1889 (52 & 53 Vict c 69) s 1 (1) and title CRIMINAL LAW and PROCEDURE Vol IX pp 483 note (g) 484. The consent of the Attorney General is necessary to proceedings for penalties (Public Health (Officers) Act 1884 (47 & 48 Vict c 74) s 2 which Act is to be construed (*ibid* s 1) as one with the principal Act of 1875. It had formerly been held that such consent was not necessary and that the penalty could be recovered by any person even though he was not a party aggrieved (*Fletcher v Hudson* (1850) 5 Ex D 287 C A).

(*q*) *Melliss v Shirley Local Board* (1885) 16 Q B D 146 C A (where the opinion was expressed that an interest in a contract which was acquired by the officer after the contract had been made would not avoid the contract) see also *City of London Electric Lighting Co v London Corporation* [1903] A C 434.

(*r*) *Barton v Puggott* (1814) 1 R 10 Q B 86.

(*s*) Public Health (Members and Officers) Act 1885 (48 & 49 Vict c 53) s 2 which Act is to be construed (*ibid* s 1) as one with the principal Act of 1875. For cases previous to this statute see *Todd v Robinson* (1884) 14 Q B D 739 C A. *Burgess v Charl* (1884) 14 Q B D 735 C A. *Wednesbury Local Board of Health v Stevenson* (1863) 27 J P 741.

(*t*) *R v Prest* (1850) 16 Q B 32. *R v Gloucester Corporation* (1809) 23 J P 709. *Edwards v Salmon* (1889) 23 Q B D 311 C A.

(*u*) See *Whitely v Barley* (1888) 21 Q B D 154 C A. *R v Ramsgate Corporation* (1889) 23 Q B D 66.

**566** Officers and servants who will have the custody or control of money must give sufficient security for the faithful execution of their office or employment and for duly accounting for such money (*b*). This is usually in the form of a bond with two sureties (*c*) which should be so drawn as to cover the tenure of office including reappointments and changes (*d*) and any alterations in salary (*e*) or in the character of the duties to be performed (*f*) by subsequent legislation (*g*) or otherwise so as to prevent the discharge of the sureties on the happening of such events (*h*).

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District  
Security

**567** Officers and servants must give written account of all moneys received and duly pay moneys in their hands to the treasurer. Rates must be paid over to the treasurer within seven days of receipt and if required a list of defaulting ratepayers, with details, must be furnished (*i*).

Account  
ability of  
officers etc

(u.) *Medical Officer of Health*

**568** The appointment and terms of appointment of a medical officer of health depend upon whether he is to be paid entirely by the local authority or whether it is intended that one half of his salary should be paid by a contribution made by the county council under the Local Government Act 1888 (*j*). In the latter case it is necessary that the conditions contained in the orders of the Local Government Board should be complied with (*l*).

In general

**569** The same person may with the sanction of the Local Government Board be appointed medical officer of health for two or more districts by the respective authorities of those districts and the mode of appointment and the proportions in which the

Appointment  
for two or  
more districts

(*b*) Public Health Act 1875 (38 & 39 Vict c 55) s 194

(*c*) For a form of bond see *Encyclopædia of Forms and Precedents* Vol VI p 226 and as to the stamp required see title BONDS Vol III pp 103 104 Stamp Act 1891 (54 & 55 Vict c 39) Sched Bond. The exemption given by the Public Health Act 1848 (11 & 12 Vict c (3) s 151 was repealed by the Public Health Act 1872 (35 & 36 Vict c 49) s 42.

(*d*) See *Birmingham Corporation v Wright* (1851) 16 Q B 623 *North v Newton* (1854) 10 Exch 247 *Oswald v Berwick upon Tweed Corporation* (1856) 5 H L Cas 806 and see title GUARANTEE Vol XV pp 495 *et seq*.

(*e*) See *Bamford v Iles* (1849) 3 Exch 380 *Holland v Lea* (1854) 9 Exch 430 *Franks v Edwards* (1852) 8 Exch 214.

(*f*) *Malling Union v Graham* (1810) 1 R 5 C P 201 see *Portsea Island Union Guardians v Withler* (1860) 2 E & L 755 *Skillett v Fletcher* (1861) L R 2 C P 469 C A.

(*g*) *Iybus v Gibb* (1856) 6 F & B 902 *Dartmouth Corporation v Silly* (1857) 7 F & B 97.

(*h*) See title GUARANTEE Vol XV p 49.

(*i*) Public Health Act 1875 (38 & 39 Vict c 55) s 195. As to the proceedings for penalties against a defaulting officer see *ibid* s 196. The sureties are not discharged by such proceedings (*ibid*). As to falsification of accounts see the Public Health Act 1875 (38 & 39 Vict c 55) s 196. As to the audit of officers accounts see pp 284 *et seq post*.

(*k*) 51 & 52 Vict c 41 s 24 (2) (b) (3) as to which see pp 276 277 362 *post*.

(*l*) Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (c) (3). There are several orders made by the Local Government Board dealing with the subject of medical officers of health namely Orders of 11th November 1872 8th March 1880, 9th March 1880 23rd March 1891 and see note (a) p 276 *post*.

**SECT 3**  
**The Urban**  
**District**

Deputy  
medical  
officer  
Qualification

expenses of appointment and the salary and charges of the officer are to be borne are determined by order of the Board (m)

During the illness or incapacity of the medical officer a deputy may be appointed and paid by the council, subject to the approval of the Board (n)

**570** In all cases a medical officer of health must be a legally qualified medical practitioner (o) and except in cases where for special reasons the Local Government Board otherwise allows he and his deputy (if any) must be legally qualified for the practice of medicine surgery and midwifery (p) A further qualification is requisite where the appointment is to be made for a district or combination of districts containing according to the last census returns 50 000 or more inhabitants in which case the appointee must also be registered in the Medical Register as the holder of a diploma in sanitary science public health or State medicine (q) or must have been during three consecutive years preceding the year 1892 a medical officer of a district or combination of districts with a population of not less than 20 000 or had been before 1868 for not less than three years a medical officer or inspector of the Local Government Board (r)

A district medical officer of a union may be appointed a medical officer of health subject to the sanction of the Local Government Board and to such conditions as the Board may prescribe (s)

Appointment

**571** Where it is not intended that half of the officer's salary should be paid out of the county grant the appointment is made by the local authority who may fix the remuneration (t) but the Local Government Board defines his duties by order (u) Where it is so intended the appointment must be in accordance with the orders of the Board (a)

Vacancy in  
office

A vacancy must be filled up forthwith unless the council obtains the consent of the Board to make a temporary appointment (b) and during the incapacity of the officer appointed a substitute may be appointed temporarily subject to the approval of

(m) Public Health Act 1875 (38 & 39 Vict c 55) s 191

(n) *Ibid*

(o) *Ibid* That is he must be duly registered under the Medical Acts as to which see title MEDICINE AND PHARMACY

(p) Local Government Act 1888 (51 & 52 Vict c 41) s 18 (1) This applies also to the appointment of a medical officer of health for a combination of districts urban or rural or both (*ut id*)

(q) Under the Medical Act 1856 (49 & 50 Vict c 45) s 21

(r) Local Government Act 1888 (51 & 52 Vict c 41) s 18 (2)

(s) Public Health Act 1875 (38 & 39 Vict c 55) s 191 As to the appointment of such officers for united district see p 291 *post*

(t) Public Health Act 1875 (38 & 39 Vict c 55) s 189

(u) See p 277 *post*

(a) The latest General Order L. dated 23rd March 1891 (Stat R & O Feb Vol IV District Council England pp 86 *et seq*) relating to urban appointments after the 25th March 1891 and to reappointments which were originally made under earlier orders and which are still in operation (see note (l) p 270 *ant*) The General Order of 23rd March 1891 contains minute provisions regulating the course of procedure in the appointment (see *ibid* arts 1-5)

(b) *Ibid* art 6

the Board (c) Provision is made for appointment or reappointment before the term has expired either by resignation or notice for a future day or by effluxion of time (d)

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The Urban  
District

**572** Where the salary is partly provided by county grant the tenure of office is fixed by the council subject to the approval of the Local Government Board but it is determined by death resignation removal by the council with the authority of the Board or by the Board itself or on proof of insanity to the satisfaction of the Board (e)

tenure of  
office and  
salary

The council may suspend the officer reporting the cause thereof to the Board and the Board may remove the suspension (f) and if the officer refuses to accept suggested alterations in his duties or salary the council may with the consent of the Board but not otherwise determine the office by six months notice in writing (g)

The officer must agree to give a month's notice before resignation, or to forfeit an agreed sum by way of liquidated damages (h)

Where the salary is to be paid in part out of the county grant such payment must be approved by the Board Further payment for extraordinary services may be made with the like approval (i)

**573** Besides the powers of his office the medical officer of health may exercise those conferred on an inspector of nuisances by the Public Health Acts (j)

Powers and  
duties.

The Local Government Board defines the duties of all the medical officers of health appointed by the urban district council and they are the same whether the officer is to be paid entirely by the council or not except that in the latter case the officer must in addition report his appointment to the Board within seven days (l)

Besides the defined duties the medical officer in any urban or rural district must send to the county council a copy of every periodical report which he sends to the Board (m) and give all necessary information to the county medical officer of health (n)

(m) *Inspector of Nuisances*

**574** The inspector of nuisances is another officer whose appointment is compulsory (o) and towards whose salary contributions

Compulsory  
appointment

(c) General Order 23rd March 1891 art 9

(d) *Ibid* arts 1, 8

(e) *Ibid* art 10

(f) *Ibid* art 11

(g) *Ibid* art 12

(h) *Ibid* art 13

(i) *Ibid* art 14 see *ibid* arts 15—17 as to payments of salaries

(k) Public Health Act 19, 5 (38 & 39 Vict c 55) s 191 and see further the text *infra* and title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(l) General Order 23rd March 1891 art 20 The duties are minutely defined by *ibid* arts 18, 20

(m) Local Government Act 1888 (51 & 52 Vict c 41) s 19 (1) The penalty for failure is the possible forfeiture of the contribution to his salary by the county council (*ibid*)

(n) Housing Town Planning etc Act 1909 (9 Edw 7 c 44) s 69 (2) The penalty for not doing so is £1 up to £10 recoverable by the county council on summary conviction (*ibid* s 69 (4))

(o) Public Health Act 1890 (38 & 39 Vict c 55) s 189 He is one of the



### SECT 8 The Urban District

Appointment  
powers and  
duties

may be made by county grant provided that the conditions of the Local Government Board have been complied with (*p*) Where it is intended that his salary shall be in part so paid the provisions relating to the appointment duties salary and tenure of office of a medical officer of health apply (*q*) Where it is not so intended the council may arrange these matters as it thinks fit (*r*)

The same person may be both surveyor and inspector of nuisances (*s*) and an inspector of nuisances may be appointed for more than one district subject to the same conditions and provisions as in the case of a like appointment of a medical officer of health (*a*)

Control as to  
duties

The duties of an inspector of nuisances part of whose salary is repaid to the urban council by the county council are defined by the Order of the Local Government Board (*b*)

#### SUB SECT 3 — Meetings

##### (1) Of the Council

Holding  
meetings

**575** An urban district council which is not a borough council must hold an annual meeting as soon after the 15th April as possible and other meetings at least once a month and at such other times as may be necessary (*c*) Meetings cannot be held in premises licensed for the sale of intoxicating liquor (*d*) so long as some other suitable room is available either free of charge or at a reasonable cost (*e*)

Summoning  
meetings

If as is usual notice of a meeting is required the absence of proper notice invalidates the proceedings (*f*) but apart from regulations made by the council notice of an adjourned meeting is not necessary (*g*)

persons authorised by statute to authenticate documents by his signature (Public Health Act 1875 (38 & 39 Vict c 55) s 266)

(*p*) Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (c) ( )

(*q*) Public Health Act 1875 (38 & 39 Vict c 55) s 191 and see p 211 ante

(*r*) Public Health Act 1875 (38 & 39 Vict c 55) s 159 see p 211 ante

(*s*) Public Health Act 1875 (38 & 39 Vict c 55) s 192

(*t*) *Ibid* s 191 see p 215 ante

(*b*) General Order 23rd March 1891 art 19

(*c*) Local Government Act 1894 (56 & 57 Vict c 7) s 51 (1) applying the Public Health Act 1875 (38 & 39 Vict c 55) s 199 Sched 1 (11) In the case of the first meeting of a newly constituted council the returning officer fixes the day and place (*ibid* Sched 1 (12)) and the members then elect a chairman for that meeting and a chairman to serve for a year at all meetings at which he is present (*ibid*) As to making regulations for meeting see *ibid* s 199 Sched 1 (1) title DIRECTIONS Vol XII p 376 A resolution of the council cannot be altered or rescinded unless a certain specified notice is given to the members setting forth the proposed alteration or rescission is a usual and proper regulation (*Mayer v Burslem Local Board* (1875) 39 J P 437) As to whether a resolution to dismiss an officer comes within such a regulation see p 274 ante

(*d*) As to such premises see title INTOXICATING LIQUORS Vol XVIII pp 1 et seq

(*e*) Local Government Act 1894 (56 & 57 Vict c 7) s 61 Urban district councils must provide all offices necessary for their business and that of their officers and servants under the Public Health Acts (Public Health Act 1875 (38 & 39 Vict c 55) s 197)

(*f*) See *Dobson v Fussay* (1831) 7 Bing 305

(*g*) See *Kerr v Wills* (1860) 6 Jur (N s) 383 H L *Wills v Murray* (1850) 4 Lxch 843

**576** Seven members, or any less number provided it be a third of the total number of councillors, form a quorum, and without the necessary number business cannot be transacted (*h*) but proceedings are not invalidated by any vacancy or vacancies among the members or by any defect in the election of the council or in the election or selection or qualification of the members (*i*)

SECT 3  
The Urban  
District  
Quorum

**577** The chairman of the council presides at the meetings, but in his absence at the time appointed for holding the same the members present appoint one of their number to preside (*k*) The chairman is not liable to an action for ruling a motion out of order unless he is guilty of malice (*l*) but in the event of his refusing to put a resolution to the meeting an action will lie for an injunction against such refusal and for a mandamus to hold a meeting for the purpose of submitting the resolution (*m*)

Chairman

**578** Questions are decided by a majority of votes of those present and voting (*n*) The chairman has a second or casting vote in the event of the voting being equal (*o*)

Proceedings

A record must be kept of members present at meetings and of the manner of their voting on any question (*p*) Minutes must also be kept (*q*)

Minutes

Neither the public nor ratepayers have the right of attending the meetings of the council without its consent express or implied (*r*) The admission of the Press is regulated by statute (*s*)

Admission

Meetings may be attended by inspectors of the Local Government Board when so directed by the Board (*t*), but they cannot take active part in the proceedings

#### (u) Of the Committees

**579** An urban district council (*u*) may appoint committees consisting either wholly or partly of its members The committees

Power to  
appoint

(*h*) Public Health Act 1875 (38 & 39 Vict c 55) Sched I (2)

(*i*) *Ibid* Sched I (9), see *Newham Local Board v Newham School Board* (1885) 50 Ch D 500 (CA) The fact that one of the members of the council is interested in the matter under discussion and speaks and uses his influence to induce the council to adopt his view does not invalidate the proceedings (*Murray v Epsom Local Board* [1897] 1 Ch 35)

(*k*) Public Health Act 1875 (38 & 39 Vict c 55) Sched I (3) (*o*)

(*l*) *Breay v Browne* (1896) 41 Sol Jo 159

(*m*) See *Pender v Iushington* (1817) 6 Ch D 70

(*n*) Public Health Act 1875 (38 & 39 Vict c 55) Sched I (7)

(*o*) *Ibid* Sched I (8) As to the chairman see p 262 *ante*

(*p*) Public Health Act 1875 (38 & 39 Vict c 55) Sched I (6)

(*q*) *Ibid* Sched I (10) As to the admissibility of minutes and orders etc as evidence see *ibid*

(*r*) *Lenby Corporation v Mason* [1908] 1 Ch 457 CA

(*s*) Local Authorities (Admission of the Press to Meetings) Act 1908 (8 Edw 7 c 43) see title PRESS AND PRINTING

(*t*) Public Health Act 1875 (38 & 39 Vict c 55), s 20a An exception was made in the case of Oxford (*ibid*) but this is now unnecessary as Oxford is now a county borough See note (*o*) p 300 and p 302 *post* This provision was limited to urban authorities which were local boards

(*u*) This provision does not apply to borough councils (Local Government Act, 1894 (56 & 57 Vict c 73) s 56 (4)) as to which see p 302 *post*

|                             |  |
|-----------------------------|--|
| <b>SECT 8</b>               | cannot hold office beyond the next annual meeting of the council, and their acts must be submitted to the council for approval   |
| <b>The Urban District</b>   | If the committee be appointed for the purposes of the Public Health Acts (i) or Highway Acts (a) the council may authorise the committee to institute any proceeding or do any act which the council might have instituted or done for that purpose other than the raising of a loan or the making of a rate or contract (b) |
| <b>Delegation of powers</b> |  |
| <b>Proceedings</b>          | The council may regulate the quorum proceedings place of meeting and area of jurisdiction of the committees but subject thereto these matters may be arranged by the committees themselves The chairman at any committee meeting has a second or casting vote (c)  |
| <b>Joint committees</b>     | Joint committees may be formed in conjunction with other councils for any purpose in respect of which the several councils are interested (d)  |

#### SECT 4 *Finance*

##### (1) *Expenses*

**580** The expenses are generally payable out of the district fund and general district rate (e)

(v) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(a) See title HIGHWAYS STREETS AND BRIDGES Vol XVI p 24

(b) Local Government Act 1891 (56 & 57 Vict c 3) s 1(1) The corresponding provision in the Public Health Act 1875 (38 & 39 Vict c 55) s 200 is repealed as to urban authorities except borough councils (Local Government Act 1894 (56 & 57 Vict c 3) s 59 subhed II) As to committees under the Housing of the Working Classes Acts see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(c) Local Government Act 1894 (56 & 57 Vict c 3) s 36 (3) Sched I Part 4 As to the right of such committee to use schoolrooms and other rooms the expense of maintaining which is payable out of local rates see *ibid* s 4 and see p 24 a e

(d) Local Government Act 1894 (56 & 57 Vict c 3) s 31 (1) (4) As to the delegation of powers and the costs and the term of office of the joint committee see *ibid* For the purposes for which a joint committee may be appointed see *ibid* ss 5 26 33 Public Health Act 1875 (38 & 39 Vict c 55) ss 28 61 and see p 246 *ante* See also Local Government (Joint Committee) Act 1891 (54 & 55 Vict c 10) and title BURNING AND ORCLEVATION Vol III p 499

(e) Public Health Act 1875 (38 & 39 Vict c 55) s 207 Public Health Acts Amendment Act 1890 (53 & 54 Vict c 39) s 4 Exceptions are made where in a borough in 1851 sanitary expenses were payable out of the borough fund or rate (Public Health Act 1875 (38 & 39 Vict c 55) s 207 see *Wilcoll Overseers v London and North Western Rail Co* (1879) 4 App Cas 461) where like expenses in improvement districts were payable out of a general district rate leviable over the whole district (Public Health Act 1875 (38 & 39 Vict c 55) s 207) where in a borough some sanitary expenses were payable out of the borough fund or rate and others were payable out of a rate or rates leviable throughout the whole district (*ibid*) in all of which cases the expenses under the Public Health Acts are to be borne by the same fund or rate as formerly As to the power of the Local Government Board to direct sanitary expenses to be payable as under the Public Health Act 1875 (38 & 39 Vict c 55) which were not in 1875 payable as such expenses under the previously existing Local Government Acts see Public Health Act 1875 (38 & 39 Vict c 55) s 209 Sched V Part 1 As to highway expenses see *ibid* s 216 and title HIGHWAYS STREETS AND BRIDGES Vol XVI p 126

The district fund is formed or supplied by the various sources of income of the urban district council. It is kept by the treasurer under a separate account called "the district fund account, and is applied by the council in its discretion for purposes legitimately charged upon it (f).

SECT 3  
The Urban  
District  
District fund  
District rate

The district rate is that levied to supplement the district fund when necessary. It is made by writing under seal and may be prospective or retrospective in the latter case being for the payment of charges (g) and expenses legally chargeable (h) which have been incurred at any time within six months before the making of the rate (i). The amount of the rate is not limited by the provisions of any local Act in force in the district (k). For the purpose of the assessment and levying of the rate the council may divide its district into parts (l).

Certain expenses incurred by the council are declared by statute to be or to be deemed to be private improvement expenses whilst others may be declared to be such by the council under

Private  
improvement  
rate

and as to private improvement expense see the text *infra*. As to the general district rate see title RATES AND RATING.

(f) Public Health Act 1870 (38 & 39 Vict c 50) s 209.

(g) Including judgments (*R v Rotherham Local Board of Health* (1805) 8 E & B 906).

(h) See *Waddington v London Union (Guardians)* (1816) 1 E & E 310. *R v Tamworth Drainage Board* (1892) 30 I R Ir 329.

(i) Public Health Act 1870 (38 & 39 Vict c 50) s 210. As to the calculation of the six months see *ibid* and *R v Rotherham Local Board of Health supra*. The time limit has no application where the debt recoverable is made chargeable on the rates by statute (*Ward v Loundes* (1859) 1 E & L 940) see further title RATES AND RATING. The court will not grant a mandamus to levy a rate which would be retrospective in a case where it is unnecessary (*Hebb v Herne Bay Commissioners* (1810) 1 L R 5 Q B 642) or where the council has no power under the circumstances to levy such a rate (*R v Bedlington Overseers* (1884) 48 J P 466, nor will such mandamus be granted to enforce a judgment obtained in an action which had been brought after six months had elapsed since the cause of action (*Bur and v Kingst n upon Hull Local Board of Health* (1862) 3 B & S 271) unless at least the delay can be satisfactorily explained (*Worthington v Hulton* (1865) 1 L R 1 Q B 63. *P v Leigh Rural Council* [1898] 1 Q B 836 C A. see also *Suire v Bunley Local Board of Health* (1859) 33 L T (o s) 222). An application for a mandamus for the purpose of obtaining payment under an award made within the six months will be granted if made within six months from the date of the award (*Ringland v Loundes* (1863) 15 C B (n s) 113). If the delay of the plaintiff renders it necessary for the council to have the protection of a mandamus before levying the rate the costs of obtaining it will not as a rule be imposed on the council (*R v Burleigh Board of Health* (1859) 1 L T 92).

(k) Public Health Act 1870 (38 & 39 Vict c 50) s 221. This saving is limited to a rate for the purposes of the Public Health Acts see *St Helens Corporation v St Helens Colliery Co* (1883) 48 J P 39. *Hill v Creighton Urban District Council* (1899) 80 I T 861 C A. *Munly v Young* [1896] 2 I R 126 C A. It does not affect exemptions under the local Act see *Bingley Urban District Council v Midland Rail Co* (1899) 80 I T 125. *Walton Commissioners v Walford* (1870) 1 R 10 Q B 180.

(l) Public Health Act 1870 (38 & 39 Vict c 50) s 211 (4). see *Dorling v Epsom Local Board of Health* (1800) 5 E & B 411. *Newport Corporation v Lang* (1892) 57 J P 199 (as to their discretion in the matter). *Mayer v Burslem Local Board* (1875) 39 J P 431 (as to the effect of a bye law on a resolution to divide). *Dryden v Putney Overseers* (1816) 1 L R D 223 (the statute does not authorise putting private improvement expenses on the general rates).

**SMOT 2.**  
**The Urban**  
**District**

Expenses  
under other  
Acts

statutory sanction (*m*), and so payable out of a private improvement rate (*n*)

**581** The expenses of exercising its powers and duties under numerous statutes are made payable by the council as part of the general expenses of its execution of the Public Health Acts (*o*)

(11) *Borrowing Powers*

In general

**582** The only powers of borrowing possessed by an urban district council are those conferred by statute and they must be exercised under the conditions and requirements of the statute otherwise the loans effected are void (*p*)

Under Public  
Health Acts

The Public Health Act 1875 (*q*) gives the council powers of borrowing or re-borrowing for the purpose of defraying expenses incurred by it in the execution of the Public Health Acts (*r*), or for the purpose of discharging loans contracted under the Sanitary Acts (*s*) or the Public Health Acts (*t*) The sanction of the Local Government Board is necessary (*a*)

(*m*) See *e q* the Public Health Act 1875 (35 & 39 Vict c 57) ss 23 36 41 62 100 Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 19 (2) when adopted Public Health (Water) Act 1888 (41 & 42 Vict c 25) ss 3 11 Housing of the Working Classes Act 1890 (53 & 54 Vict c 70) s 39 (8) and see titles BURIAL AND CREMATION Vol III p 485 PUBLIC HEALTH AND LOCAL ADMINISTRATION SEWERS AND DRAINS

(*n*) As to which see the Public Health Act 1875 (35 & 39 Vict c 57) ss 213—215 and titles HIGHWAYS STREETS AND BRIDGES Vol XVI pp 224 *et seq* LATHS AND RATING

(*o*) See the Public Health Act 1875 (35 & 39 Vict c 57) s 20, and for instances see the Laths and Washhouses Act 1846 (9 & 10 Vict c 74) s 16 Burial Act 1860 (23 & 24 Vict c 64) s 1 Tramways Act 1870 (33 & 34 Vict c 78) s 20 Canal Boats Act 1877 (40 & 41 Vict c 60) s 5 Electric Lighting Act 1882 (45 & 46 Vict c 56) s 7 Public Health and Local Government Conferences Act 1885 (48 & 49 Vict c 22) s 2 subject to the regulations of the Local Government Board as to which see General Order 13th May 1891 Contagious Diseases (Animal) Act 1886 (49 & 50 Vict c 32) s 9 (2) Open Spaces Act 1887 (50 & 51 Vict c 37) s 8 (1) Infectious Disease (Notification) Act 1889 (52 & 53 Vict c 77) s 9 Technical Instruction Act 1889 (52 & 53 Vict c 76) s 4 Infectious Disease (Prevention) Act 1890 (53 & 54 Vict c 34) s 20 Housing of the Working Classes Act 1890 (53 & 54 Vict c 70) ss 24 (2) 42 (1) 65 Museums and Gymnasiums Act 1891 (54 & 55 Vict c 22) s 10 (2) Public Libraries Act 1892 (55 & 56 Vict c 53) s 18 (1) Private Street Works Act 1892 (55 & 56 Vict c 57) s 23 Isolation Hospitals Act 1893 (56 & 57 Vict c 68) ss 18 26 Local Government Act 1894 (56 & 57 Vict c 73) s 25 Small Dwellings Acquisition Act 1899 (62 & 63 Vict c 44) s 9 (3) Advertisements Regulation Act 1907 (7 Edw 7 c 27) s 4 Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) s 3 (1)

(*p*) See *Re Companies Acts Ex parte Watson* (1888) 21 Q B D 301 *Wentlock (Baroness) v Ruer Dec Co* (1885) 10 App Cas 304 *Wentlock (Baroness) v Ruer Dec Co* (1888) 38 Ch D 534 C A *A G v De Winton* [1906] 2 Ch 106 (overdraft at the bank for an unauthorised purpose)

(*q*) 38 & 39 Vict c 57

(*r*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*s*) These Acts were repealed by the Public Health Act 1875 (38 & 39 Vict c 55) s 343 and Sched V Part 1 For the meaning of the term see *ibid* n. 4

(*t*) Public Health Act 1875 (38 & 39 Vict c 55) s 233 which does not apply to expenses which are incurred under local Acts nor does it enable the council to borrow for the purpose of paying off loans under local Acts

(*a*) *Ibid* For the method of borrowing etc see *ibid* ss 233—243 317

Powers of borrowing are given to the council for the purpose of executing the powers and duties conferred or imposed upon it by many statutes (b)

**SECT 3**  
**The Urban District**

(iii) *Accounts and Audit*

Under other statutes

**583** The accounts and books of account to be kept by the urban district council are prescribed by order of the Local Government Board (c). Separate accounts are required to be kept in respect of loans borrowed from the Public Works Loan Commissioners (d) of allotments (e) of burial boards (f), of the dwelling house improvement fund and other matters under the Housing of the Working Classes Act 1890 (g) of baths and washhouses (h), of public libraries (i) and of isolation hospitals (k).

What accounts to be kept

Accounts in the prescribed form must be made up yearly to the 31st March or in the case of accounts which are required to be audited half yearly, half yearly to the 30th September and the 31st March in each year (i).

Making up accounts

**584** An annual report must be made to the Local Government Board in such manner and at such time as it directs of all works executed and of all sums received and disbursed under and for the purposes of the Public Health Acts (j) during the preceding year (k), and a copy must be published in a local newspaper (l).

Annual reports

(i) *E.g.* Tramways Act 1870 (33 & 34 Vict c 18) s 20 Baths and Washhouses Act 1878 (41 & 42 Vict c 14) s 9 Electric Lighting Act 1892 (45 & 46 Vict c 36) s 8 Epidemic and Other Diseases Prevention Act 1883 (46 & 47 Vict c 59) s 2 Local Government Act 1888 (51 & 52 Vict c 41) s 2 (7) Technical Instruction Act 1889 (52 & 53 Vict c 76) s 4 Housing of the Working Classes Act 1890 (53 & 54 Vict c 70) ss 25 (1) 45 (1) 66 as amended by Housing Town Planning, etc Act 1909 (9 Ldw 7 c 44) s 7a and Sched VI Museums and Gymnasiums Act 1891 (54 & 55 Vict c 22) s 10 Public Libraries Act 1892 (55 & 56 Vict c 33) s 19 (1) Small Holdings and Allotments Act 1908 (6 Ldw 7 c 36) s 33 (4) (a).

(c) Accounts of Local Boards Order 22nd March 1880. This is the only Order relating to the subject. Its schedule contains forms showing how the several books of account are to be kept. The books consist of a minute book a ledger, or a highway repairs expenditure account and an order check book.

(d) Public Works Loans Act 1875 (38 & 39 Vict c 89) s 6.

(e) See title ALLOTMENTS Vol I p 339.

(f) Burial Act 1860 (23 & 24 Vict c 64) ss 1 2 3 and see title BURIAL AND CREMATION Vol III p 186.

(g) 53 & 54 Vict c 10 ss 41 42 and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(h) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(i) Local Government Act 1894 (56 & 57 Vict c 33) s 38 (1). As to accounts required to be audited half yearly see Public Health Act 1875 (38 & 39 Vict c 35) s 246 relating to the audit of the accounts of a borough council under that Act and see p 324 *post*. No forms of accounts have been published by the Local Government Board other than those of 22nd March 1880 (see note (c) *supra*).

(j) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(k) Public Health Act 1875 (38 & 39 Vict c 35) s 206. This applies to both urban and rural councils. As the General Order of the Local Government Board 22nd March 1880 (see note (c) *supra*) prescribes and requires a financial statement of accounts to be sent to the Local Government Board this is a sufficient compliance with the statutory requirement.

(l) Public Health Act 1875 (38 & 39 Vict c 35) s 206.

SECT 3  
The Urban  
District  
Auditors.

**585** The accounts of the urban district council (*m*) and its committees and officers (*n*) are audited by district auditors (*o*), appointed by the Local Government Board with the sanction of the Treasury, and removable by the Board (*p*). Their duties and districts are assigned to them by the Board (*q*). They and the assistant district auditors who may also be appointed by the Board (*a*) are paid out of moneys provided by Parliament and to such an amount as the Treasury may sanction (*b*) but contributions are obtained from local authorities by means of stamps affixed to or impressed upon the financial statements which are submitted to the auditor for audit (*c*).

The audit.  
Time

**586** The accounts are to be audited and examined once in every year as soon as possible after the 20th March (*d*) in accordance with regulations made by the Local Government Board (*e*). The Board may also make rules modifying enactments as to the publication of notice of the audit and of the abstract of accounts and as to the report of the auditor (*f*).

Notice

At least (*g*) fourteen days' notice of the time and place of the audit

(*n*) As to audits in boroughs see pp 324 *et seq post*

(*n*) Including any officer or assistant who is required to receive money or goods on behalf of the council (Public Health Act 1845 (39 & 39 Vict c 50) s 250). In the case of an officer dying before the audit his personal representatives must account in his place (General Order 22nd March 1850 art 21). The accounts of overseers collecting or paying away money for the purposes of the Public Health Acts are audited by the poor law auditors (Public Health Act 1845 (38 & 39 Vict c 50) s 45).

(*o*) Local Government Act 1874 (36 & 37 Vict c 13) s 58 (1). No power is given to the Local Government Board to order extraordinary audits as they may do in the case of the accounts of overseers see title POOR LAW. The district auditors audit the accounts not only of urban district councils other than borough councils but those of rural district councils parish council parish meetings (see pp 244 260 *ante* and 331 *post*) county councils and their committees (see p 363 *post*) port sanitary authorities (see p 292 *post*) joint boards and any other accounts to which their audit may be applied by statute *eg* the Housing of the Working Classes Act 1890 (53 & 54 Vict c 70) the Museums and Gymnasiums Act 1891 (54 & 55 Vict c 22) and the Public Libraries Act 1892 (55 & 56 Vict c 53).

(*p*) District Auditors Act 1849 (42 & 43 Vict c 6) 4. The Act is applicable to all persons or bodies of persons who receive or expend any local rate but not to overseers of the poor (*ibid* s 8). As to local rate see *ibid*.

(1) *Ibid* s 4

(a) *Ibid*

(b) *Ibid* ss 2 & 4. The district auditor is not prevented from recovering any expenses incurred in any proceedings which he is authorised or required to take or defend (*ibid* s 12).

(c) *Ibid* ss 2 & 6 and Sched I (where the scale of duty is set out).

(d) Public Health Act 1870 (38 & 39 Vict c 50), s 247 (1). General Order 2nd March 1850 art 1.

(e) District Auditors Act 1849 (42 & 43 Vict c 6) s 5 which defines what subjects may be dealt with by the regulations. Disobedience to the regulations incurs penalties in the case of the first two offences the third is a misdemeanour (*ibid* Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) s 95).

(f) Local Government Act 1894 (56 & 57 Vict c 73) s 58 (3).

(g) Public Health Act 1875 (38 & 39 Vict c 50) s 247 (3). The term at least excludes both the first and last days see *R v Shropshire Justices* (1838) 8 Ad & El 173. The form of notice of audit the mode of giving it and the form of certificate of publication are prescribed as regards parish councils (see p 244 *ante*) by Order of Local Government Board 20th April 1900 as regards parish meetings (see p 260 *ante*) by Order of Local Government Board, 22nd

## PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

and of the deposit of accounts as required by statute must be given by advertisement in a local newspaper. The appointment is made by the auditor, and the notice is given by the council. The production of the newspaper containing the notice is sufficient proof of the notice in all proceedings (*h*).

SECT 3  
The Urban  
District

In the case of the audit of accounts of a joint committee of district councils or of a joint committee of a district council or councils and a parish council or parish meeting or parish councils or parish meetings including the account of a joint committee appointed by a borough council with another council not being a borough council the rule as to publication of notice is modified (*i*).

**587** A copy of the accounts duly made up and balanced and all books and documents mentioned or related to in such accounts must be deposited in the council's office and be open during office hours to the inspection of all persons interested (*j*) for seven clear days (*i*) before the audit and all such persons may take copies of or extracts from the same without fee or reward. Neglect to make up the accounts and books or altering or allowing them to be altered when made up or refusing to allow inspection is punishable by a penalty up to £5 (*k*). Opportunity to inspect accounts at the time of the audit is also to be provided to such extent and in such manner as in the opinion of the auditor will not interfere with the audit (*l*).

Deposit of  
accounts

Inpection

Penalty for  
refusal

**588** The auditor may by summons in writing compel the production of all necessary documents and the attendance before him of any person holding or accountable for the same from whom he may require a signed declaration of the correctness of the documents and books. Penalties are imposed for neglect or refusal and a false or corrupt declaration is punishable as perjury (*m*). The attendance of the clerk and officers of the council is also required (*n*).

Production of  
documents

**589** A ratepayer or owner (*o*) of property in the district may be present at the audit and may raise objections to the accounts and may appeal against allowances by the auditor just as he may appeal against disallowances (*o*). The auditor is further required to receive

Objections by  
ratepayers

March 1895 as regards joint committees (see pp 216-250 *ante*) of district councils or of district councils and parish councils or parish meetings by Order 26th April 1900.

(*h*) Public Health Act 1875 (38 & 39 Vict c 55) s 247 (3).

(*i*) See Order of Local Government Board 26th July 1899. The form and manner of giving notice and the form of certificate are prescribed by Order 26th April 1900.

(*j*) The fact that a person otherwise interested is bankrupt does not disqualify him for inspection (*Marginson v Lisleley* (1903) 61 J P 276).

(*k*) Public Health Act 1875 (38 & 39 Vict c 55) s 247 (4). In reckoning the seven days the day of publication of the notice and the day of the audit must be excluded (*Liffin v Fisher* (1842) 1 Dowl (N S) 167).

(*l*) General Order 22nd March 1880 art 40.

(*m*) Public Health Act 1875 (38 & 39 Vict c 55) s 241 (5). Documents cannot be refused on the ground that they are not relevant or relate to other matters as well as the audit. The auditor is entitled to judge for himself see *Hilliams v Manchester Corporation* (1897) 45 W R 112. As to perjury see title CRIMINAL LAW AND PROCEDURE Vol IX pp 490 *et seq*.

(*n*) General Order 22nd March, 1880 art 13.

(*o*) Public Health Act 1875 (38 & 39 Vict c 55) s 241 (6). As to the



**SECT 8**  
**The Urban**  
**District**

any objection made by a ratepayer or any person aggrieved, to examine into its merits, and decide the same. He must state the grounds of his decision, and offer to enter his reasons in the book of account then being examined if so required (p)

**Disallowances**  
**and**  
**surcharge.**

**590** The auditor must disallow every item of account contrary to law and surcharge the same on the person making or authorising the making of the illegal payment (q) but he cannot disallow expenses which have been sanctioned by the Local Government Board (r). He must charge against any accounting person the amount of any deficiency or loss incurred by the latter's negligence or misconduct or of any sum which ought to have been brought into account by him certifying in all cases the amount so due (s).

Any person aggrieved is entitled on application to a statement in writing of the reasons for the auditor's decision in respect of disallowance or surcharge or allowance (s) and in case of disallowance or surcharge the auditor must declare the grounds of his decision and offer to state the grounds in writing if required to do so by the person aggrieved in the proper books of account forthwith or so soon as the arrangements for the audit will permit. He must also report the disallowance or surcharge to the Local Government Board (t) and a similar report must be given where a surcharge is made owing to money or goods having been purloined, embezzled, wasted or misapplied or owing to deficiency or loss occasioned by negligence or misconduct (u).

**Appeal**

(1) *certiorari*

(11) appeal of  
Local Govern-  
ment Board

The party aggrieved may either apply to the King's Bench Division for a writ of *certiorari* (a) to remove the disallowances or allowances (b) into the High Court in the same way as in the case of disallowances or allowances by poor law auditors (c) or he may appeal to the Local Government Board which has the same powers as it possesses in the case of appeals against allowances, disallowances, and surcharges by the poor law auditors (d) namely of inquiring into and deciding upon the lawfulness of the reasons stated by the auditor for the allowance, disallowance or surcharge and to issue an order thereon, as it may deem proper (e) including the remission

meaning of owner see Public Health Act 1870 (38 & 39 Vict c 50) s 4 and title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(p) General Order 22nd March 1880 art 18. As to the duties of the auditor see *ibid* arts 14—19

(q) Public Health Act 1870 (38 & 39 Vict c 50) s 247 (7). He has no discretion in the matter see *Barton v Piggott* (1874) L R 10 Q B 86. The person to be surcharged must be a person who has control of the funds not e.g. a surveyor who gives a certificate upon which an unauthorised payment is made (*R v Calvert* [1898] 2 I R 266).

(r) Local Authorities (Expenses) Act 1887 (50 & 51 Vict c 72) s 3

(s) Public Health Act 1870 (38 & 39 Vict c 55) s 247 (7)

(t) General Order 22nd March 1880 art 10

(u) *Ibid* art 20

(a) See title CROWN PRACTICE Vol X pp 174 192

(b) Public Health Act 1870 (38 & 39 Vict c 50) s 241 (6) (8)

(c) *Ibid* s 247 (8). The court has the same power in such cases. As to such cases see Poor Law Amendment Act 1844 (7 & 8 Vict c 101) s 35 36

(d) Public Health Act 1870 (38 & 39 Vict c 55) s 247 (6) (8)

(e) Poor Law Amendment Act 1844 (7 & 8 Vict c 101) s 36

## PART I —LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

of a disallowance or surcharge upon payment of costs (*f*), and this latter power cannot be controlled by the courts (*g*)

SECT 3  
The Urban  
District

**591** The auditor is required, after auditing the accounts in the ledger, to sign a certificate at the foot of the balance sheet (*h*), and to indorse a certificate in the other books that they have been audited (*i*)

Certificate of  
auditor

The auditor must report on the audited and examined accounts within fourteen days after completion of the audit. The report must be delivered to the clerk of the council, who must deposit it in the council's office and publish an abstract of the accounts in the local newspapers (*j*). Reports of the audit of joint committees must be sent to the Local Government Board (*k*).

Report by  
auditor

At the close of the audit the auditor must send to the Local Government Board a report in a prescribed form (*l*) showing what required books and accounts are not kept or are imperfectly kept or kept in a form not prescribed by the Board (*m*).

**592** Any person certified as liable to pay any sums of money must pay the amount to the treasurer of the council within fourteen days after the case has been certified, unless there is an appeal. Any costs and expenses including a reasonable compensation for loss of time if and so far as are not recovered from the party liable may be recovered by the auditor from the council (*n*).

Recovery of  
surcharges

Payment of the certified sums is enforced by obtaining from the justices a warrant of distress and sale of the goods and chattels of the person liable so to pay (*o*).

Distress and  
sale

The only proofs required in such proceedings from the auditor are proof of his appointment by production of his certificate of appointment under the seal of the Local Government Board that the audit was held that the certificate of liability to pay was made in the proper book of a count and that the sum has not been paid

Proof  
required on  
application to  
justices

(*f*) Poor Law Audit Act 1846 (11 & 12 Vict c 91) s 4

(*g*) *A. G. v. Merthyr Tydfil Union* [1900] 1 Ch 516 (A)

(*h*) General Order 2<sup>nd</sup> March 1880 art 22. The exact form of certificate is there given. The certificate at the foot of the balance sheet is to the effect that he has examined the accounts and compared the treasurer's payments with the vouchers and that the balance shown in the treasurer's account agrees with the balance appearing in the treasurer's hands or in the event of there being a discrepancy accounting for the same.

(*i*) Public Health Act 1875 (38 & 39 Vict c 55) s 247 (10). A modification of this provision is made in the case of rural district councils parish councils parish meetings and joint committees of the two latter (General Order 20<sup>th</sup> May 1895) and in the case of joint committees appointed wholly or partly by district councils (Order of Local Government Board 26<sup>th</sup> July 1895).

(*j*) *Ibid*

(*k*) General Order 22<sup>nd</sup> March 1880 Sched Form B

(*m*) *Ibid* art 23

(*n*) Public Health Act 1875 (38 & 39 Vict c 55) s 247 (9)

(*o*) *Ibid* Poor Law Amendment Act 1844 (7 & 8 Vict c 101), s 32 and similarly under the Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 11. As to courts of summary jurisdiction generally, see title MAGISTRATES pp 531 *et seq post*. As to distress under the Summary Jurisdiction Acts see title DISTRESS Vol XI pp 221 *et seq*.

**SECT 8**  
**The Urban**  
**District**

within the time limited (p) The certificate of liability is final and cannot be reviewed by the justices and they have no discretion as to issuing the warrant (q)

Proceedings to enforce payment must be commenced within nine calendar months from the disallowance or surcharge by the auditor or in the event of appeal either to the court or to the Local Government Board, from the final determination of such appeal (r)

**Financial**  
**statement**  
**(1) by council**

**593** The council must prepare and submit to the district auditor at every audit a financial statement in duplicate, in the prescribed form (s) containing the particulars prescribed by the Local Government Board One of the duplicates must have the proper stamp affixed or impressed the amount of duty being regulated by the statutory scale (t) At the conclusion of the audit the auditor cancels the stamp and certifies on each duplicate in the form prescribed by the Local Government Board the amount in words at length of the expenditure audited and allowed the compliance with the regulations with respect to such statement and that he has ascertained by the audit the correctness of the statement

The auditor sends the duplicate so stamped and certified to the Local Government Board and in this case a return of the receipts or expenditure contained in the statement need not (u) unless the board requires be sent to the Board under the Local Taxation Returns Acts 1860 and 1877 (a)

**(11) by joint**  
**committee**

Every joint committee is required to submit to the authorities appointing them at the next meeting of those authorities a copy of the financial statement of the accounts of the joint committee as certified by the district auditor (b)

**Solicitor's**  
**bills.**

**594** Solicitor's bills chargeable to the council may be submitted for taxation to the clerk of the peace for the county (c) The

(p) Poor Law Audit Act 1848 (11 & 12 Vict c 91) s

(q) See *P v Innis* (1899) 1 P & L 955 *R v Inverclyde* (1900) 1 D & B 900

(r) Poor Law Amendment Act 1849 (12 & 13 Vict c 103) s 9 As to final determination see *Brook v Dolby Sanitary District v Dolby* (1902) 66 J P 552

(s) The form prescribed for urban district council other than borough councils is that contained in the General Order of Local Government Board 18th April 1900 Forms for rural district councils have not been issued but they use those of rural sanitary authorities under an Order 26th April 1899

The form of statement required from all joint committees appointed for purposes other than those of the Burial Acts (as to which see Order 29th April 1902) by any combination of district councils including borough councils appointing with other councils not being borough councils parish councils or parish meetings and whose accounts are subject to audit under the Local Government Act 1891 (56 & 57 Vict c 73) s 55 (see pp 244 284 ante) is prescribed by an Order 21st April 1900

(t) For the scale see District Auditors Act 1893 (47 & 48 Vict c 6) Sched I

(u) District Auditors Act 1894 (42 & 43 Vict c 6) s 3

(a) 23 & 24 Vict c 5 40 & 41 Vict c 66

(b) Order of Local Government Board 26th July 1899 art 4

(c) Public Health Act 1875 (38 & 39 Vict c 54) s 249 This does not prevent an ordinary order for taxation being made (*Re Black and Croydon Rural*

## PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT.

amount found due after taxation is *prima facie* evidence of the reasonableness, but not of the legality, of the charge. Failing submission for taxation the decision of the auditor upon the reasonableness and the legality of the charge is final (*d*)

SECT 3  
The Urban  
District  
Taxation

### (iv) Adjustment of Property Debts and Liabilities

**595** Differences as to any powers rights duties capacities liabilities, obligations or property transferred, or alleged or claimed to be transferred in pursuance of the Public Health Acts (*e*) or any provisional order made thereunder may be settled by an order of the Local Government Board on the application of any authority from or to whom the transfer is effected or is alleged or claimed to be effected or on the application of any person affected by the transfer (*f*). The Board may also by order adjust any accounts arising out of or incidental to such powers rights duties etc. or to the transfer thereof and may direct by whom and to whom any moneys found due are to be paid and the mode of raising such moneys (*f*).

Under Public  
Health Acts

If however the order directs any rate to be made or any other act or thing to be done which the party required to make or do would not apart from the provisions of the Acts have been enabled to make or do by law the order is provisional until confirmed by Parliament. The settlement or adjustment may be included in any provisional order which gives rise to it (*g*).

Provisional  
order

**596** Any adjustment required for the purpose of the Local Government Act 1894 (*h*) may be effected by agreement or failing that by arbitration.

Under Local  
Government  
Act 1894

### SUB SECT 3—Legal Proceedings

**597** In common with other bodies urban district councils may take proceedings to protect their corporate existence property and rights (*i*). Express powers of taking legal proceedings other than summary proceedings are given them in respect of nuisances (*h*) and

Actions by  
urban  
councils

*Sanitary Authority* (1896) 2 T L R 336 *Southampton (Guardians v Bell and Taylor)* (1888) 21 Q B D 291.

(*d*) The High Court cannot open the matter or revise the decision. See *R v Hunt* (1806) 6 I & B 408. The clerk of the peace is remunerated for such taxation at a rate fixed by the Master of the Crown Office and declared by Order of Local Government Board 20th April 1877. The rate allowed is 4d per sheet or folio of seventy-two words for the taxation of every bill due to any solicitor in respect of legal business performed on behalf of any local authority, whose accounts are required to be audited by the Public Health Act 1875 (38 & 39 Vict c 50).

(*e*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health Act 1875 (38 & 39 Vict c 55) s 304.

(*g*) *Ibid*. This provision does not prevent the parties having their differences settled by other methods. compare *Bexley Local Board v West Kent Sewerage Board* (1882) 9 Q B D 518 (proceedings under a local Act the terms of which made the Local Government Board the sole tribunal for the determination of differences).

(*h*) Local Government Act 1894 (56 & 57 Vict c 73) s 65.

(*i*) See *A G v Brecon Corporation* (1818) 10 Ch D 204 and see title CORPORATIONS Vol VIII pp 366 392 *et seq*.

(*h*) Public Health Act 1875 (38 & 39 Vict c 55) s 107 and see titles NUISANCE PUBLIC HEALTH AND LOCAL ADMINISTRATION.

**SECT 3**  
**The Urban**  
**District**

public rights of way (l), and to prevent the pollution of streams (m) and, in the case of urban councils only to promote or protect the interests of the inhabitants of their district (n) In all such proceedings the general law relating to the presence or absence of the Attorney General is applicable (o) The powers of councils to take necessary proceedings for the enforcement of their duties as sanitary authorities are dealt with elsewhere (p)

Except in the above mentioned cases urban district councils are not empowered to charge the rates with the costs and expenses of legal proceedings even though such proceedings may be deemed to be advisable in the interests of the inhabitants and ratepayers (q)

**Actions**  
**against**  
**district**  
**councils**

**598** Urban and rural councils may render themselves liable to all proceedings civil and criminal to which private individuals and companies may render themselves liable for breaches of contract and wrongs committed in the exercise or purported exercise of their duties and powers subject to the common law limitation that for example as highway authorities the councils are not liable for nonfeasance such as neglect to repair (r)

**Appearance**  
**in legal**  
**proceedings**

**599** The council may appear before any court or in any legal proceeding by its clerk (s) or by any officer or member authorised generally or in respect of any special proceeding by resolution of the council (t)

The clerk or such authorised person may institute (a) and carry

(l) Local Government Act 1894 (57 & 58 Vict c 73) s 26 see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 162

(m) Public Health Act 1875 (38 & 39 Vict c 55) s 69 see titles NUISANCE WATERS AND WATERCOURSES

(n) Lough Linn Act 1872 (35 & 36 Vict c 91) ss 1 2 and see p 380 *note* As to proceeding under the Public Health (London) Act 1891 (54 & 55 Vict c 76) see titles HIGHWAYS STREETS AND BRIDGES Vol XVI p 210 METROPOLIS

(o) see titles HIGHWAYS STREETS AND BRIDGES Vol XVI pp 158 247 NUISANCE PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(p) See titles FOOD AND DRUGS Vol XV p 39 HIGHWAYS STREETS AND BRIDGES Vol XVI pp 142 *note* (s) 223 225 239 PUBLIC HEALTH AND LOCAL ADMINISTRATION and generally as to summary procedure title MAGISTRATES p 531 *post* As to proceedings in the county court see title COUNTY COURTS Vol VIII pp 617 618

(q) See *A G v Rickmansworth Urban District Council* (1902) 66 J P 410

(r) See titles CORPORATIONS Vol VIII pp 364 365 HIGHWAYS STREETS AND BRIDGES Vol XVI pp 153 *et seq* INJUNCTION Vol XVII p 241 NUISANCE PUBLIC AUTHORITIES AND PUBLIC OFFICERS As to the limitation of actions against local authorities see titles LIMITATION OF ACTIONS p 116 *ante* PUBLIC AUTHORITIES AND PUBLIC OFFICERS and as to enforcing judgments against them see titles CORPORATIONS Vol VIII pp 396 397 EXECUTION Vol XIV pp 12 81 126

(s) In a case where justices refused to determine a complaint without the attendance of the clerk of the local authority the Court of Queen's Bench refused to compel them to do so (*Le parte Teamington Local Board* (1862) 5 L T 63)

(t) The defendant is entitled to call for proof of authorisation and unless this be forthcoming the proceedings are invalid see *Thorpe v Priestnall* [1897] 1 Q B 159

(a) Proceedings are instituted by the laying of an information (*Thorpe v Priestnall*, *supra*, and see *I v Wallace* (1797) 1 East, P O 186 *Beardsley v Giddings* [1904] 1 K B 847 *Brooks v Bagshaw* [1904] 2 K B 798) and see title FOOD AND DRUGS Vol XV pp 30 31

on any proceeding which the council may institute and carry on under the Public Health Act, 1875 (*b*) This does not give the representative a right of audience where by the rules of the court before which he is appearing only counsel can be heard (*c*), nor does it empower the council to delegate prosecutions to the police, who are not its officers nor under its control (*d*)

SECT 3  
The Urban  
District

SUB SECT 6—*Miscellaneous.*

(1) *Union of Districts*

**600** Districts may be united, on the application of rural and urban district councils for certain purposes affecting public health (*e*) and the Local Government Board may, under certain conditions by order unite districts for the purpose of appointing a medical officer of health (*f*)

By Local  
Government  
Board

Two or more local authorities may without any sanction of the Local Government Board combine for the purpose of executing, and maintaining any works that may be for the benefit of their districts or any part thereof (*g*) and two or more councils may combine in providing a common hospital (*h*)

Construction  
for mutual  
benefit

(2) *Enforcement of Duties*

**601** The proper discharge by a local authority of its duties under the Public Health Acts (*i*) may be enforced by the Local Government Board (*j*)

Under Public  
Health Acts

The duty imposed upon an urban district council to enforce the provisions or exercise the powers imposed or conferred upon it by statutes is generally enforced under the special provisions of those statutes (*l*)

Under other  
statutes

(*b*) 38 & 39 Vict c 55 s 259

(*c*) *R v London Justices* [1896] 1 Q B 659 C A

(*d*) *Kyle v Tarber* (1888) 58 I F 229

(*e*) Public Health Act 1875 (38 & 39 Vict c 55) s 279

(*f*) *Ibid* s 286 See *ibid* for the powers of and regulations to be made by the Board on the matter the notices preliminary to making the order and the arrangements which can be made for constituent and united districts and see p 270 *ante*

(*g*) Public Health Act 1875 (38 & 39 Vict c 55) s 285 which also gives power to a local authority to execute works in an adjoining district with the consent of the council of that district

(*h*) *Ibid* s 131 and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*i*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*j*) When this remedy is applicable no other legal proceeding is available (*Robinson v Workington Corporation* [1897] 1 Q B 619 C A *Pasmore v Oswaldtwistle Urban Council*, [1898] A C 387 *Dent v Bournemouth Corporation* (1897) 66 I J (Q B) 390) For the procedure etc to procure enforcement see the Public Health Act 1875 (38 & 39 Vict c 55) ss 45 106 290 299—302

(*k*) See for instance the Housing of the Working Classes Act 1890 (53 & 51 Vict c 70) s 8 Housing Town Planning etc Act 1909 (9 Edw 7, c 44) and title PUBLIC HEALTH AND LOCAL ADMINISTRATION Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) s 24 and titles ALLOTMENTS Vol I p 305 SMALL HOLDINGS AND SMALL DWELLINGS Factory and Workshop Act 1901 (1 Edw 7 c 22) s 5 and title FACTORIES AND SHOPS Vol XIV, p 465 and as to highways and rights of way, see title HIGHWAYS, STREETS, AND BRIDGES Vol XVI, pp 138 *et seq*

## SECT 3

(iii) *Towns Improvement Clauses Act 1847***The Urban District**

Incorporations with Public Health Act 1875

**602** Certain provisions of the Towns Improvement Clauses Act, 1847 (*l*) are incorporated with the Public Health Act, 1875 (*m*) for the purpose of regulating certain matters in urban districts such as those relating to the naming of streets and the numbering of houses, the improvement of the line of streets and the removal of obstructions ruinous and dangerous buildings, and precautions during the construction and repair of sewers streets and houses (*n*)

SECT 4—*The Port Sanitary Authority*

## Definition

**603** The port sanitary authority is the body constituted by the Local Government Board to act permanently or temporarily as the sanitary authority of any port (*o*) established for the purposes of the laws relating to the Customs of the United Kingdom (*p*)

## Constitution by order

The authority may be constituted permanently by provisional order (*q*) or by a simple order (*r*) When proceeding by provisional order the Board may until the order has been made and confirmed by Parliament temporarily constitute the authority by order and may from time to time renew such order and may make by it or by its renewal such provisions as the Board may make by provisional order (*s*)

## Effect of order

The order gives the port sanitary authority jurisdiction over all waters within the limits of the port and also over the whole or such portions of the district within the jurisdiction of any riparian authority as may be specified in the order (*t*) and no other authority may there exercise powers which have been conferred on the port sanitary authority (*u*) It may assign (*a*) to the port sanitary authority any powers rights duties capacities liabilities (*b*) and obligations under the Public Health Acts (*c*), or the Infectious Disease (Prevention) Act 1890 (*d*)

In the case of joint boards it may contain regulations for such

(*l*) 10 & 11 Vict c 34 for which see p 329 *post*

(*m*) Public Health Act 1875 (38 & 39 Vict c 55) s 160

(*n*) Towns Improvement Clauses Act 1847 (10 & 11 Vict c 34) ss 64–83 see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 236–257

(*o*) As to such ports see titles REVENUE WATERS AND WATERCOURSES

(*p*) Public Health Act 1875 (38 & 39 Vict c 55) s 287 and see *ibid* for who may be constituted a port sanitary authority Such authorities existing in 1875 were continued unaffected (*ibid* s 376) See the Customs Consolidation Act 1861 (24 & 25 Vict c 36) ss 11–16 and title METROPOLIS

(*q*) Public Health Act 1875 (38 & 39 Vict c 55) s 287

(*r*) As to which see Public Health (Ships etc) Act 1865 (48 & 49 Vict c 35) s 3

(*s*) Public Health Act 1875 (38 & 39 Vict c 55) s 287

(*t*) *Ibid* s 288

(*u*) *Ibid* s 289

(*a*) *Ibid* s 287 Public Health (Ports) Act 1896 (59 & 60 Vict c 20) s 1

(*b*) The authority and its officers are protected against personal liability (Public Health Act 1875 (38 & 39 Vict c 55) s 265)

(*c*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*d*) 53 & 54 Vict c 34 By the Infectious Disease (Notification) Act 1889 (52 & 53 Vict c 2) s 16 the term port sanitary district means the port sanitary district of London and any port or part of a port for which a port sanitary authority has been constituted and the district then ceases to form part of any urban or rural district for the purposes of the Act, see titles METROPOLIS PUBLIC HEALTH AND LOCAL ADMINISTRATION

matters as may be regulated by the provisions of a provisional order forming a united district (e)

The port sanitary authority may with the sanction of the Local Government Board, delegate the exercise of any of its powers to any riparian authority within or bordering on its district (f)

**604** The method of paying the expenses of a port sanitary authority permanently constituted is provided for in the order of constitution (g)

In the case of a temporary authority the expenses are defrayed out of a common fund to be contributed by the riparian authorities in such proportions as the Local Government Board determines and the Board may by order exempt one or more of the authorities from such payment (h)

Such port sanitary authority being an urban or rural district council raises its proportion of expenses in the same way as any other expenses, for the purposes of the Public Health Acts (i) are raised (k)

SECT 4  
The Port  
Sanitary  
Authority

Delegation of  
powers  
Expenses  
(1) per-  
manent  
authority  
(2) tem-  
porary  
authority

SECT 5—*The Borough*

SUB SECT 1—*In General*

**605** The borough (l) is a city or town to which the Municipal Corporations Act 1882 (m) applies. Its area is defined by its charter or by the provisional order or local Act altering the boundaries (n)

Meaning of  
borough

SUB SECT 2—*The Municipal Corporation*

(1) *Description*

**606** The municipal corporation (o) is the body corporate constituted by the incorporation of the inhabitants of a borough or city (p)

Meaning of  
municipal  
corporation

(e) Public Health Act 1875 (38 & 39 Vict c 55) s 257. As to the formation of united districts see p 339 *post*

(f) Public Health Act 1875 (38 & 39 Vict c 55) s 289

(g) *Ibid* s 287. See Public Health (Ports) Act 1896 (59 & 60 Vict c 20) s 1

(h) Public Health Act 1875 (38 & 39 Vict c 55) s 290

(i) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(k) Public Health Act 1875 (38 & 39 Vict c 55) s 290. For the recovery of expenses see *ibid* ss 290 292 and for borrowing powers *ibid* s 244

(l) For original meanings of the word borough see Jacob's Law Dictionary Littleton's Tenures s 164 Co Litt 109 a 115 b Com Dig tit Burrough 1 Bl Com 114. For the definition of parliamentary borough see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7 (1). Interpretation Act 1889 (52 & 53 Vict c 63) s 10 (3) and see title ELECTIONS Vol XII p 178. As to borough and local courts of record see title COURTS Vol IX pp 127 *et seq*

(m) 45 & 46 Vict c 50 s 7 (1) but now repealed by the Statute Law Revision Act 1898 (61 & 62 Vict c 22). See the definition in the Interpretation Act 1889 (52 & 53 Vict c 63) s 15 (1) and as to the application of the Municipal Corporations Act 1882 (45 & 46 Vict c 50) see title ELECTIONS Vol XII p 190 note (q)

(n) As to alterations see p 322 *post*

(o) For the law governing corporations generally see title CORPORATIONS Vol VIII pp 279 *et seq*

(p) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 1 (1)



SECT 8  
The  
Borough

How com-  
posed

Rights of  
burgesses

in England or Wales (g) Incorporation is now obtained by the grant of a charter (r)

The municipal corporation is composed of the mayor (s), aldermen (t), and burgesses or citizens (a) The burgesses or citizens (b) are those persons whose names appear for the time being on the burgess roll (c)

**607** In municipal affairs a burgess has the right of voting at the election of councillors (d) and of the two elective borough auditors (e), of being elected a councillor provided he possesses the other necessary qualifications (f) of inspecting and taking copies of or extracts from the minutes of proceedings of the council (g) or an order of the council for the payment of money (h) or the rate books (i) He alone may take proceedings against corporate officers for acting in the corporate office without having made the necessary declaration or without qualification (k)

(g) The Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 3 does not extend to Scotland or Ireland

(r) Under *ibid* ss 210—218 The City of London is an unreformed corporation and is not subject to the Act of 1882 see title METROPOLIS Metropolitan boroughs (see *ibid*) are not municipal boroughs within the meaning of the word as used in this article for the kinds of boroughs see pp 299 301 *post* The mention of a body corporate in connection with a town named in one of the Schedules to the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) is *prima facie* evidence that it is a municipal corporation but it is not conclusive and may be rebutted by evidence to the contrary (*R v Turner* (1831) 6 Ad & 11 518) in this case (relating to Gatehead) the *prima facie* evidence was successfully rebutted Judicial cognisance has been taken of the existence of a corporation without requiring the production of the charter where the existence of the corporation was notorious *et q* in the case of Manchester although this city was not mentioned in the Schedules to the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) (*R v Turner* (1872) 12 Cox C C 313)

(s) See p 309 *post*

(t) See p 308 *post*

(a) Burgess includes 'citizen' (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7(1)) By the Interpretation Act 1889 (52 & 53 Vict c 63) s 15(1) a reference to the mayor aldermen and burgesses in any Act passed thereafter includes a reference to the mayor aldermen and citizens The freemen no longer constitute or form an integral part of the corporation see *Lincoln Corporation v Holmes Common* (1867) L R 2 Q B 482 and generally p 321 *post*

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7(1)

(c) *Ibid* s 9(1) see title ELECTIONS Vol XII p 246

(d) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11(1) His right does not depend on his being entitled to be on the burgess roll it is sufficient if his name appears there (*ibid* s 51)

(e) *Ibid* s 25(1) as to auditors see p 324 *post*

(f) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11(2) In this case he must not only be enrolled a burgess but also be entitled to enrolment (*ibid*) as to councillors see pp 302 *et seq post*

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 233(1), and see p 316 *post*

(h) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 233(2) and see p 320 *post*

(i) Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c 26) s 13

(k) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 224(1) and see pp 296 326, *post* As to the right of voting when a parliamentary borough was

**608** The municipal corporation bears the name of "The Mayor, Aldermen, and Burgesses of the Borough of —," or "The Mayor Aldermen and Citizens of the City of —" as the case may be (*l*) The corporate seal is the common seal of the municipal corporation (*m*)

SECT 6  
The  
Borough  
Style of  
corporation  
Seal

(11.) *Corporate Property*

**609** The corporate property is vested in the municipal corporation subject to the rights possessed by the freemen previous to 1835 (*n*) It may consist of corporate land that is land belonging to or held in trust for the municipal corporation (*o*) or corporate stock (*p*) The proceeds of such corporate property go into the borough fund (*q*) of which the municipal corporation is trustee (*r*)

Vesting of  
corporate  
property

disfranchised under the Representation of the People Act 1867 (30 & 31 Vict c 102) see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 240 As to liability to serve on juries in a quarter sessions borough see title JURIES Vol XVIII pp 230 236

(1) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 8 The change of name introduced by the Municipal Corporations Act 1835 (5 & 6 Will 4 c 16) did not create a new corporation nor affect the continuity of the old corporation (*Doe d Bristol Hospital (Governors) v Norton* (1843) 11 M & W 913 *Ludlow Corporation v Tyler* (1836) 7 C & P 337 *A G v Kerr* (1840) 3 Beav 420 *A G v Newcastle Corporation* (1842) 5 Beav 301 *per Lord LANGDALE MR* at p 314 *A G v Leicester Corporation* (1846) 9 Beav 546) and although the mayor aldermen and burgesses or citizens acting by the council are the urban authority for the purposes of the Public Health Act 1875 (38 & 39 Vict c 55) s 6 they are not thereby constituted a separate body They exercise and perform their rights and duties under the Public Health Acts in accordance with the laws in force with respect to municipal corporations subject however to any provisions of the Public Health Act 1875 (38 & 39 Vict c 55) s 198 see *Adams v Ryde Corporation* (1874) L R 9 Exch 302 *Hyde Corporation v Banl of England* (1882) 21 Ch D 176 So the alteration (see p 262 *ante*) of urban sanitary authorities into urban district councils which include councils of boroughs and cities does not alter the style or title of the corporation or council of the borough (Local Government Act 1894 (56 & 57 Vict c 13) s 21 (1)) nor does the conversion of a borough into a county borough (Local Government Act 1888 (51 & 52 Vict c 41) ss 31 34 (3)) as to county boroughs see p 300 *post* It is improper to use the term citizens in the name of a borough (*A G v Worcester Corporation* (1846) 2 Ph 3 *Richester Corporation v Lee* (1846) 10 Sim 376) but as to misnomer and its effect see generally title CORPORATIONS Vol VIII p 308 A misnomer or inaccuracy in the description of any place mentioned in the Schedule to the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) cannot affect the operation of the statute relating to municipal corporations (Municipal Corporations Act 1882 (45 & 46 Vict c 50), s 241)

(*m*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7 (1)

(*n*) *Lancaster Corporation v Holmes Common* (1861) L R 2 Q B 482

(*o*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7 (1)

(*p*) Corporate stock consists of all the stocks funds or public securities standing in the books of the Bank of England or of any other public company or society in the name of the corporation under any style or title of incorporation (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 118 (1)) As to transfers of stock see *ibid* s 118 (1)–(7) and the Forged Transfers Acts 1891 (54 & 55 Vict c 43) and 1892 (55 & 56 Vict c 36), and see title COMPANIES Vol V p 195

(*q*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 139 as to the borough fund see p 319 *post*

(*r*) *Arnold v Gravesend Corporation* (1856), 2 K. & J 574

## SECT 5

The  
BoroughCorporate  
offices  
Acceptance  
of office(iii) *Corporate Offices.*

**610** The corporate offices are those of mayor, alderman, councillor and elective auditor (s)

**611** Every qualified (t) person elected to a corporate office must, unless exempted by law (a) either accept the office or render himself liable to a fine (b) Acceptance is signified by the person elected making and signing a declaration (c)

The declaration must be made and subscribed before the members of the council or the town clerk who have power to receive the same (d) within five days after regular (e) notice of election (f) If this is not done the person elected is liable to pay to the council such fine as may be prescribed by bye law (g) or if there is no bye law in the case of an alderman councillor or elective auditor a fine of £25 and in the case of a mayor £50 (h) The fine is recoverable summarily (i) Until he has made and subscribed the declaration the person elected must not act in the office except in administering the declaration (l)

Non acceptance of the office creates a casual vacancy (l)

**612** A person who acts in a corporate office (m) before making the required declaration (n) or without being qualified at the time of making it or after ceasing to be qualified or after becoming disqualified (o) is liable to a fine (p) not exceeding £50 but if in fact he was enrolled as a Burgess he is not liable merely because he was

Penalty for  
acting in  
office before  
acceptance  
or during dis-  
qualification

(s) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 7 (1) The mayor aldermen and councillors form the council see p 307 *post* As to the mayor see p 309 *post* aldermen p 308 *post* councillors p 302 *post* and elective auditor p 324 *post*

(t) As to qualification see p 303 *post*

(a) See p 297 *post*

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 34 (1) and see title CORPORATIONS Vol VIII pp 327 328

(c) 1 or the form of declaration see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 30 Sched VIII Form A

(d) *Ibid* s 239 (1) The Promissory Oaths Act 1868 (31 & 32 Vict c 72) applies (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 239 (2))

(e) Casual information is not sufficient He must have regular notice of his election either by being actually present when it is announced or by being apprised of the fact by some official authority (*R v Preece* (1843) 5 Q B 94 91)

(f) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 34 (1)

(g) *Ibid* There must be some evidence of qualification before a fine can be imposed see *I v Richmond* (1862) 11 W R 65

(h) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 34 (2)

(i) *Ibid* s 34 (4) As to summary proceedings generally see title MAGISTRATES pp 531 *et seq post*

(l) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 37 A person who administers the declaration to a councillor whom he knows to be disqualified cannot act as a relator in *quo warranto* proceedings against the latter (*R v Greene* (1842) 2 Q B 460 and see title CROWN PRACTICE Vol X p 156)

(m) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 40 (3)

(n) Except for the purpose of administering the declaration to someone else (*ibid* s 30)

(o) See the text *supra*

(p) See pp 303 304 *post*

(q) Recoverable by action (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 41 (1)) As to this proceeding see *ibid* s 224 and pp 326 327 *post*

not entitled to be so enrolled (*q*) His liability to a penalty ceases when the disqualification ceases (*r*) but it does not cease because the period within which the elections could be called in question has expired (*s*)

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A councillor acts in his office if he takes part in the discussions of the council without voting (*t*) and the fact of his acting is sufficiently evidenced by producing an attendance book of the members signed by him and the minute book of the council showing his name as an attending member (*a*)

What is  
acting in  
office

The disqualification of a corporate officer does not affect the validity of his acts whilst holding that office and an election to a corporate office cannot be questioned on the ground of the defect or want of title of the election officer nor can a Burgess roll be questioned by reason of a defect in the title or want of title of the mayor if he was in actual possession of the office (*b*)

Validity of  
acts not with-  
standing dis-  
qualification

**613** The following persons are exempt by law —(*i*) any person disabled by lunacy or imbecility of mind or by deafness blindness or other permanent infirmity of body (*c*) (*ii*) any person who being above the age of sixty five years, or having within five years before the day of his election either served the office or paid the fine for non acceptance claims exemption within five days of his election (*d*) (*iii*) any military naval, or marine officer in His Majesty's service on full pay or half pay (*e*), (*iv*) any officer or other person employed and residing in any of His Majesty's dockyards victualling establishments arsenals barracks or other naval or military establishments and army reserve men (*f*) (*v*) any resident member of the Universities of Oxford and Cambridge (as respects the municipal corporations of Oxford and Cambridge) (*g*) (*vi*) dissenting

Exemptions.

(*q*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 41 (1) (2)

(*r*) *Lewis v Carr* (1876) 1 Ex D 484 C A

(*s*) *De Souza v Cobden* [1891] 1 Q B 687 C A

(*t*) *Charlesworth v Rudgard* (1830) 1 Cr M & R 896

(*a*) *Hunnings v Williamson* (1883) 11 Q B D 533 C A

(*b*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 42 The fact that the acts of a disqualified person in a corporate office are valid does not prevent an inquiry on an election petition into the validity of a vote given by him in virtue of such office (*Nell v Longbottom* [1894] 1 Q B 167) a councillor whose election is declared void cannot before the avoidance of his election give a valid vote at the election of a mayor (*Bland v Buchanan* [1901] 2 K B 75) and as to municipal elections generally see title ELECTIONS Vol XII pp 338 *et seq*

(*c*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 34 (3) (*a*)

(*d*) *Ibid* s 34 (3) (*b*)

(*e*) *Ibid* s 253 and see the Army Act 1881 (44 & 45 Vict c 59) s 146, and as to such persons see title ROYAL FORCES

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 203 Army reserve men are exempt from any parochial township or borough office (Reserve Forces Act 1882 (45 & 46 Vict c 48) s 7) Royal naval reserves and army special reserves (see title ROYAL FORCES) are exempt from serving as peace or parish officers (Naval Volunteers Act 1803 (16 & 17 Vict c 13) s 8 Royal Naval Reserve (Volunteer) Act 1859 (22 & 23 Vict c 40) s 7 Naval Reserve Act 1900 (63 & 64 Vict c 52) s 1 (4) Militia Act 1887 (40 & 46 Vict c 49) s 41 Territorial and Reserve Forces Act 1907 (7 Ldw 7 c 9) see also Local Militia (England) Act 1812 (52 Geo 3 c 38) s 197

(*g*) Municipal Corporations Act 1882 (45 & 46 Vict c 50), s 257 (4)

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ministers (*h*), (vii) Roman Catholic priests (*i*) (viii) any commissioner or assistant commissioner of excise or officer of excise or person employed in the collection or management of or accounting for the revenue of excise or any part thereof during the time of his acting as such commissioner or assistant commissioner or officer or being so employed as aforesaid (*h*), (ix) any officer or person appointed by the Commissioners of Inland Revenue or employed by them or under their authority or direction in any way relating to any of the duties under their care and management so long as he continues in and exercises such office or employment (*l*) (x) any commissioner officer clerk or other person acting in the management or service of the customs (*m*) (xi) every registrar of births and deaths and every registrar of marriages (*n*) (xii) any Postmaster General or officer of the Post Office (*o*) (xiii) any inspector of factories and workshops (*p*) (xiv) every registered medical practitioner (*q*) (xv) every person registered as a dentist (*r*)

Resignation  
of corporate  
office

**614** A person elected to a corporate office and duly holding the same (*s*) may at any time by writing signed by him and

(*h*) From any parochial or ward office or other office in any hundred of any shire city town parish division or wapentake (stat (1689) 1 Will & Mar c 18 s 8 Places of Religious Worship Act 1812 (22 Geo 3 c 155) s 9) see title ECCLESIASTICAL LAW Vol XI pp 513 *et seq*

(*i*) The same exemption as in note (*h*) *supra* (Roman Catholic Relief Act 1791 (31 Geo 3 c 32) s 8) see title ECCLESIASTICAL LAW Vol XI p 807

(*l*) Excise Management Act 1824 (7 & 8 Geo 4 c 53) s 11 repealed by the Inland Revenue Regulation Act 1890 (53 & 54 Vict c 21) s 40 and re-enacted by *ibid* s 8 which applies to exemption from any corporate parochial or other public office or employment As to the persons referred to in notes (*h*) (*l*) (*m*) see title REVENUE

(*l*) Inland Revenue Regulation Act 1890 (53 & 54 Vict c 21) s 6 applying to the offices of mayor sheriff and all corporate parochial or other offices or employments Commissioners (see title INCOME TAX Vol XVI p 612) are also exempt from all parish and ward offices (Income Tax Act 1842 (5 & 6 Vict c 35) s 30)

(*m*) Customs Consolidation Act 1876 (39 & 40 Vict c 36) s 9 This also applies to parochial and other public offices

(*n*) Births and Deaths Registration Act 1836 (1 Will 4 & 1 Vict c 22) s 18 applying to every parochial and corporate office whatsoever As to such person see title REGISTRATION OF BIRTHS MARRIAGES AND DEATHS

(*o*) Post Office (Management) Act 1837 (7 Will 4 & 1 Vict c 33) s 17 repealed by the Post Office Act 1908 (8 Edw 7 c 48) but re-enacted by *ibid* s 43 which applies to the office of mayor sheriff and all corporate parochial or other public offices or employments and see title POST OFFICE

(*p*) Factory and Workshop Act 1901 (1 Edw 7 c 22) s 118 (6) applying to all parochial and municipal offices and as to such persons see title FACTORIES AND SHOPS Vol XLV p 5

(*q*) Medical Act (21 & 22 Vict c 90) s 35 This also exempts from parochial ward hundred and township offices and as to such persons see title MEDICINE AND PHARMACY As to apothecaries see stat (1694) 6 & 7 Will & Mar c 4 s 2

(*r*) Dentists Act 1878 (41 & 42 Vict c 33) s 30 and see title MEDICINE AND PHARMACY This also exempts from parochial ward hundred and township offices

(*s*) The words and duly holding the same do not appear in the Municipal Corporations Act, 1882 (45 & 46 Vict c 50) but are to be implied A person who is disqualified cannot resign (*Hardwick v Brown* (1873), L R. 8 Q B 406)

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delivered to the town clerk resign the office on payment of the fine provided for non acceptance thereof (t) In any such case the council must forthwith declare the office to be vacant and signify the same by notice in writing, signed by three members of the council countersigned by the town clerk and fixed on the town hall, and the office thereupon becomes vacant (a), and although it will not become vacant until all these prescribed conditions have been fulfilled (b) whenever the writing has been delivered to the town clerk and the fine has been paid the resignation as such is irrevocable (c) No person enabled by law to make an affirmation instead of taking an oath is to be liable for any fine for non acceptance of office by reason of his refusal on conscientious grounds to take any oath or make any declaration required by the Municipal Corporations Act 1882 (d) or to take on himself the duties of the office (d)

**615** A person ceasing to hold a corporate office will unless disqualified to hold the office, be re eligible (e) Until however he complies with the conditions of requalification he is not re eligible (f) Re eligibility

**616** Casual vacancies in corporate offices are filled by election as in ordinary vacancies the person elected holding office for the unexpired term of the vacating officer If there be more than one casual vacancy the elected go out of office according to the number of their votes the holder of the smallest number taking the place of the officer who would have first retired and so on If there has been no contest the council determines the order of retirement (g) Filling casual vacancies

SUB SECT 5—*Constitution of Boroughs*

(1) *Varities of Boroughs*

**617** A city has been said to be a borough incorporate which City bath or hith had a bishop (h) but the existence (present or past) of a bishopric is not essential to the existence of a municipal city

As to proceedings for a *quo warranto* absolute although the defendant has purported to resign the office and his supposed resignation has been accepted see title CROWN PRACTICE Vol X pp 131 132 140

(t) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 36 (1)

(a) *Ibid* s 36 (2)

(b) *R v Welchpool Corporation* (1876) 30 I T 594 and following that decision WRIGHT and GAINSFORD PRUCE JJ in a later case held that an alderman who in the course of rotation is about to go out of office under the Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 14 (5) (6) cannot by merely resigning his office before the ordinary day of election of aldermen and in the absence of a declaration by the council that the office is vacant set aside of his disqualification to vote at the election of aldermen under *ibid* s 60 (3), repealed by the Municipal Corporations Amendment Act 1910 (10 Edw 7 & 1 Geo 5 c 19) s 1 (2) (*Lease v Loudon* [1899] 1 Q B 386)

(c) *R v Wigan Corporation* (1885) 14 Q B D 908

(d) 45 & 46 Vict c 50 s 36 (3)

(e) *Ibid* s 37

(f) *Hardwick v Brown* (1855) L R 8 C P 406

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 40 (1) (2) see title ELECTIONS Vol XII p 39

(h) Co Litt 109 b The note in Hargrave's edition shows that it was not

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County  
boroughs

The title of 'city' is a rank or dignity which is almost invariably created by the exercise of the Royal prerogative by letters patent (i)

**618** Before 1888 certain cities and towns obtained by Royal charter the special privilege of being counties of themselves having their own sheriffs (k) and being free from the jurisdiction of the officers of the county at large. These were usually known as counties of towns or counties of cities (l)

In 1888 every borough which on the 1st June of that year either had a population of at least 50 000 or was a county of itself was for the purposes of local government made an administrative county of itself and called a county borough (m) but for all other purposes it continues to be part of the county in which it is situate (n)

Further any borough having a population of not less than 50 000 may be constituted a county borough by the same procedure as county boundaries may be altered that is by provisional order of the Local Government Board confirmation by Parliament is necessary (o)

Effect of  
constitution  
of county  
borough

The effect of a borough being recognised or constituted a county borough is to give to the mayor, aldermen and burgesses acting by the council all the powers duties and liabilities of a county council (p) but to leave the constitution election proceedings and position of the county borough council and the appointment of its officers and their duties to be regulated by the Municipal Corporations Act, 1882 (q)

Certain statutory provisions affecting counties in general have no application to county boroughs namely those relating to the constitution election proceedings or position of the county council or its chairman (r) the county treasurer county surveyor and

necessary that the borough should be incorporated and Westminster is instanced see also in Digest Borough Grant Law of Corporations 52

(i) Ripon is an exception having been created a city by means of a section in a local Gas Act (City of Ripon Act 1866 (28 & 29 Vict c cxxvi) s 54)

(k) See title SHERIFFS AND BAILIFFS see also 111 Com 21st ed 120

(l) A list of those existing in 1835 is found in the Municipal Corporations Act 1835 (5 & 6 Will 4 c 6) s 61

(m) Local Government Act 1888 (51 & 52 Vict c 41) s 31. A list of such county boroughs is found in *ibid* Sched III. For an extension of this list see note (o) *sup* a

(n) Local Government Act 1888 (51 & 52 Vict c 41) s 31. If a separate commission of assize over and terminer and gaol delivery is not directed to be executed within the borough the borough for such purpose is to be part of the county in which it is specified in the Schedule to the Act to be deemed to be situate (*ibid*). As to the adjustment of financial relations with the county see *ibid* ss 32-34

(o) Local Government Act 1888 (51 & 52 Vict c 41) s 54 (1)-(3). Under this power the following have been (1911) constituted county boroughs since 1888—Blackpool Bournemouth Burton upon Trent Grimsby Merthyr Tydfil Newport (Mon) Oxford Rotherham Smethwick Southport Stoke on Trent Tynemouth Warrington West Hartlepool

(p) See Local Government Act 1888 (51 & 52 Vict c 41) s 34 (1)

(q) *Ibid* s 34 (3) (a) (b). The financial relations of county boroughs to the county in which they are situate is dealt with on pp 353 *et seq post*

(r) See pp 346 *et seq post*

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other county officers (e) the standing joint committee of the justices and the council (a) coroners (b) gas meters (c), the transfer to the county council of powers relating to county and other rates and the preparation or revision of the basis or standard for the county rate (d) and except where expressly mentioned those relating to finance (e)

Further the council of a county borough cannot deal with the division of the county into polling districts for parliamentary elections for the county the appointment of places of election for the county revision courts and registration of parliamentary county voters (f) nor is the council of a county borough the county authority for the purpose of allotments (g)

**619** A quarter sessions borough is one having a separate court of quarter sessions and includes a county of a city and a county of a town subject to the Municipal Corporations Act 1882 (h)

Quarter  
sessions  
borough

**620** The right of certain boroughs to have a separate commission of the peace (i) is unaffected by the Municipal Corporations Act 1882 (k), and the Crown has power on the petition of the council of a borough to grant to the borough a separate commission of the peace (l) and this is not affected by any subsequent grant to or for any county of a similar commission (m)

Borough  
with separate  
commission of  
the peace

(n) *Special Cities Boroughs and Places*

**621** The Cinque Ports were originally Dover (n) Sandwich Romney Hastings (o) and Hythe the two ancient towns of Winchelsea and Rye have since been added (p) To some of these

Cinque Ports

(e) See pp 34 *et seq post*

(a) See p 349 *post*

(b) As to the e see Local Government Act 1888 (51 & 52 Vict c 41) s 34 (4) (a) and title CORONERS Vol VIII pp 218 236

(c) See title GAS Vol XV p 344

(d) See pp 359 368 *post*

(e) These are contained in the Local Government Act 1888 (51 & 52 Vict c 41) Part IV see p 300 *post*

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 34 (6)

(g) *Ibid* s 34 (7) and see title ALLOTMENTS Vol I pp 311 *et seq* As to the union of county boroughs with each other or with counties see Local Government Act 1888 (51 & 52 Vict c 41) ss 54 5, As to bridges and main roads see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 26

(h) Local Government Act 1888 (51 & 52 Vict c 41) s 100 As to its position in the county see p 372 *post* as to its financial relationship with the county see Local Government Act 1888 (51 & 52 Vict c 41) ss 35—38 pp 353 *et seq post* see also titles CORONERS Vol VIII pp 218 *et seq* COURTS Vol IX p 747 MAGISTRATES pp 531 *et seq post*

(i) See generally on this subject title MAGISTRATES p 540 *post* As to their position in the county see p 374 *post*

(k) 45 & 46 Vict c 50 s 20 (5) which preserved this right in the case of boroughs named in the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) Sched A

(l) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 156

(m) *Ibid* s 187

(n) Dover is now a larger quarter sessions borough as to which see p 372 *post*

(o) Hastings is a county borough and see p 302 *post*

(p) Hythe Sandwich and Rye are smaller quarter sessions boroughs see



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were attached subordinate ports or towns called their corporate members. Other towns and villages known as unincorporated members were also subject to their jurisdiction (*q*). With the exception of Hastings the Cinque Ports and their ancient towns and members form for local government purposes part of the county in which they are respectively situate (*r*).

**Cambridge**  
**and Oxford**

**622** Cambridge is a municipal borough, Oxford is a city and a county borough. The composition of the council in each provides for the representation of the university and the privileges of the chancellor, masters and scholars thereof are protected (*s*).

**SUB SECT 4—Government of the Municipal Borough**

**(1) The Council**

**Constitution**

**623** The municipal corporation acts by and through the council of the borough which consists of the mayor, aldermen and councillors (*t*) but the council is not incorporated and acts in the name of the corporation.

**(11) The Councillors**

**(a) In General**

**Who are**  
**eligible**

**624** The councillors are to be fit persons elected by the burghesses (*a*). An unmarried woman is eligible as a councillor if she possesses the necessary qualifications (*b*).

p 372 *post* Winchelsea (see note (*a*), p 329 *post*) and Romney are not municipal boroughs.

(*q*) See also title **COURTS** Vol IX pp 127—129 and pp 328 329 *post* as to certain prescriptive boroughs under the Municipal Corporations Act 1883 (16 & 4 Vict c 15).

(*r*) The Statute of *Midges* (stat (1530) 22 Hen 8 c 5 s 5) exempted the Cinque Ports and their members from its provisions. As to the commission of the peace to the liberties of the Cinque Ports see title **COURTS** Vol IX p 125. The Cinque Ports Act 1811 (51 Geo 3 c 36) the Cinque Ports Act 1850 (18 & 19 Vict c 49) the Cinque Ports Act 1850 (20 & 21 Vict c 1) and the Cinque Ports Act 1869 (32 & 33 Vict c 53) were preserved by the Municipal Corporations Act 1862 (45 & 46 Vict c 50) s 248 (*i*) and should be referred to for details as to the ports see also Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 248. Local Government Act 1888 (51 & 52 Vict c 41) ss 38 45.

(*s*) See Local Government Board's Provisional Orders Confirmation (No 15) Act 1889 (52 & 53 Vict c cxvi). Local Government Board's Provisional Orders Confirmation Act 1889 (52 & 53 Vict c xv). Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 119 201. As to the position of Cambridge and Oxford in the matter of contributions to certain expenses of paving, lighting, and cleansing streets and places as existing before 1810 see Public Health Act 1815 (38 & 39 Vict c 50) s 278.

(*t*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 10 and see Interpretation Act 1889 (52 & 53 Vict c 63) s 15 (1). The term district council includes the council of a borough (Local Government Act 1894 (56 & 57 Vict c 73), s 21 (3)).

(*u*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11 (1). As to burghesses see title **ELECTIONS** Vol XII p 162. As to the election of councillors see title **ELECTIONS** Vol XII pp 339 *et seq*.

(*v*) Qualification of Women (County and Borough Councils) Act 1907 (7 Edw 7 c 33). A married woman during coverture cannot be elected, see title **ELECTIONS** Vol XII, p 183.

(b) *Statutory Qualification*

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Qualification

**625** A person is not qualified to be elected nor to be a councillor unless (c)—

(1) he is seised or possessed of real or personal property or both, to the value of £1 000 in a borough having four or more wards or of £500 in any other borough (d), or is rated to the poor rate on the annual value or the rateable value (e) of £30 in a borough having four or more wards or of £15 in other boroughs (f) and

(2) unless he is (i) enrolled and entitled to be enrolled as a burgess (g), or (ii) being entitled to be so enrolled in all respects except that of residence he resides beyond seven miles but within fifteen miles (h), of the borough and is entered on the separate non resident list (i) which the overseers are required to make (k) or (iii) qualified at the time of his election to elect to the office of councillor (l)

(c) *Disqualification*

**626** A person who for any reason does not possess the burgess qualification is not eligible as a councillor (m)

Statutory  
disqualifi-  
cations

A person is disqualified (n) for election or for service as a councillor if and while he is an elective auditor (o) or holds any office or place of profit (p) other than that of mayor or sheriff, in

(c) These provisions do not apply to the councils of Cambridge and Oxford as to which see p 302 *ante*

(d) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11 (2) (c) The division of a borough into a greater number of wards is not to affect the qualification of councillors (*ibid* s 30 (9))

(e) *Baker v Marsh* (1854) 4 L & B 144

(f) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11 (2) (c) and see note (d) *supra*

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11 (2) (a) See title ELECTIONS Vol XII p 182 and as to the burgess roll see also *ibid* p 344 The appearance of a person's name on the roll is not conclusive evidence that he is entitled to be enrolled (*Middleton v Simpson* (1850) 5 C P D 183) It is not necessary that he should be on the roll at the time of nomination (*Budge v Andrews* (1858) 3 C P D 510)

(h) Measured in a straight line on a horizontal plane and determined by the map of the ordnance survey (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 231)

(i) *Ibid* s 11 (2) (b)

(k) *Ibid* s 49 see title ELECTIONS Vol XII p 205

(l) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 11 (3) As to the qualifications necessary to be entitled to appear on the burgess roll see title ELECTIONS Vol XII pp 182 *et seq* and see *ibid* pp 181 note (d) 312 Although the qualification is required only at the date of election subsequent cessation of residence within the borough for six months disqualifies and the seat becomes vacant unless the person elected was at the time of his election and still continues to be qualified in some other manner (Municipal Corporations Act, 1882 (45 & 46 Vict c 50) s 11 (4))

(m) As to the burgess qualification see notes (g) and (i) *supra* As to the effect of acting in a corporate office when disqualified see generally p 296 *ante*

(n) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 12

(o) *Ibid* s 12 (1) (a) For elective auditors see pp 324 325 *post* This does not refer to the mayor's auditor who must be a member of the council (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 20 (3)) see p 324 *post*

(p) The fact that the holder of the office does not take the profit but allows

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the gift or disposal of the council (g) or is in holy orders (r) or is the regular minister of a dissenting congregation (s) or has directly or indirectly, by himself or his partner any share or interest in any contract or employment with by or on behalf of, the council (t) subject however to certain exceptions (a) or has been convicted of misapplying corporate funds towards parliamentary election expenses (b) or is adjudicated bankrupt (c) or has been found guilty of corrupt practices or certain other offences against election law (d)

**Disqualification by interest in a contract**

**627** A person is interested in a contract none the less because the contract is not made directly with the council but with a person who has so contracted (e) Nor does the fact that the amount involved is trifling (f) nor the fact that the amount of remuneration has not been fixed make any difference (g)

A contract between a council and a person who was trustee for a councillor (h) and a contract between a member of a council and the

another to do so makes no difference (*Delane v Hille* at (1529) 9 B & C 310) As to what will be considered to amount to an office of profit see *Delane v Hille* *supra* per LITTLEDELL J at p 313

(g) This includes a person who holds a paid office under a distress committee established by the borough council under the Unemployed Workmen Act 1907 (o Fdw 1 c 18 (*Crumph v Lewis* [1908] 1 K B 505) As to the candidature and office of the mayor see pp 306-309 *post* of an alderman see p 305 *post* and of the recorder see p 307 *post* and title MAGISTRATES p 344 *post*

(r) This disqualification does not apply to the members of the councils of Oxford and Cambridge

(s) By regular minister is meant someone in an analogous position to a beneficed clergyman Where a decision of a Baptist church refused an invitation to become the minister of an Independent chapel but subsequently agreed to preach for the latter without salary for a specified period of nine months it was held that he was not disqualified for election as town councillor (*R v Oldham* (1869) 1 R 4 Q B 210)

(t) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 12 (1) (c) see the text *infra*

(a) See p 306 *post*

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 124

(c) See p 307 *post*

(d) See note (f) p 266 *ante*

(e) *Barnacle v Clart* [1900] 1 Q B 279 (a case under the Elementary Education Act 1870 (33 & 34 Vict c 77) s 34) see also *Le Teuvre v Luncheon* (1854) 3 E & B 30 In *Nutton v Wilson* (1869) 2 L Q B D 144 C A disqualification was declared on the part of a person who was employed by contractors with a local board to do portions of such contract work see also *Tomkins v Jelliffe* (1887) 51 J P 247 The mere letting of a horse and cart at a fixed sum to a contractor for his work under a local authority has been held to disqualify (*Touhey v White* (1826) 5 B & C 120) see *Whiteley v Barley* (1888) 21 Q B D 154 C A

(f) Such is the view now generally adopted see *R v Rowlands* [1906] 2 K B 292 *Nell v Longbottom* [1894] 1 Q B 161 *Nicholson v Fields* (1862) 7 H & N 910 *Lewis v Carr* (1876) 1 Ex D 484 C A *Nutton v Wilson* (1889) 22 Q B D 744 C A *Woolley v Kay* (1856) 1 H & N 307

(g) *Fletcher v Hudson* (1881) 7 Q B D 611 C A Where the member of a board of guardians collected rent on behalf of the board without any agreement as to commission and subsequently paid over the receipts after deducting commission he was held to be disqualified although he had returned the sum retained before the board had declared his office vacant (*R v Rowlands, supra*)

(h) *Simpson v Ready* (1844) 12 M & W 736

trustees of a non provided school with whom the council arranged to pay for the fuel for warming the building when used as a school (i) are sufficient to disqualify. A contract made colourably under the name of another person equally disqualifies although the interest is concealed (l) but on the other hand a contract made by the agent of a member purporting to be made on his behalf but contrary to his express directions, will probably not disqualify the member (l) and if the statutory prohibition is against knowingly and willingly entering into a contract a contract made with an institution in ignorance that it is such an institution as the statute contemplates does not disqualify (m).

It is immaterial that the contract is one that cannot be sued on by reason of its not being under seal (n).

A person is interested in a contract if he takes an assignment of it by way of security even before his election (o).

**628** The disqualification continues so long as the contract exists and the interest in it remains (p) so that where a person having a contract with a local authority obtained a release from the committee of the authority subject to the approval of the authority which was not given until after his nomination as a candidate, he was held to be disqualified (q) but if the contract is terminated no penalty can be recovered for subsequent acts (a) unless the interest in the contract (b) has caused the defendant to cease to be a member altogether (c).

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Contracts  
sufficient to  
disqualify

How long  
disqualifica-  
tion lasts

(i) *Cox v Truscott* (1905) 69 J P 174 see *Todd v Robinson* (1884) 14 Q B D 739 C A

(k) *Walsh v Grimsby* (1900) *Times* 30th November

(l) *Miles v McIlwraith* (1883) 8 App Cas 120 P O

(m) *Royse v Birley* (1899) L R 4 C P 296

(n) *R v Francis* (1852) 18 Q B 526

(o) *Hunnings v Williamson* (1883) 11 Q B D 533 C A

(p) *Lewis v Carr* (1896) 1 Ex D 484 C A

(q) *Re Gloucester Municipal Election Petition* 1900 *Ford v Newth* [1901] 1 K B 683 see also *Cox v Truscott* (1905) 69 J P 174

(a) *Lewis v Carr* *supra* *Cox v Truscott* *supra*

(b) *Fletcher v Hudson* (1881) 1 Q B D 611 C A. A borough councillor who during his term of office takes a disqualifying interest in a contract is suspended from office but may resume and act in it when his interest ceases (*Cox v Truscott* *supra*). The disqualification arises if and while he is so interested (Municipal Corporations Act 1882 (45 & 46 Vict c 60) s 12 (1)). In the case of members of urban and rural district councils and of parish councils and of boards of guardians they are by such interest disqualified for being elected or being councillors (see pp 241 264 *ante*) and there is no provision which limits the period of their qualification to the period of their disqualifying interest (Local Government Act 1894 (56 & 57 Vict c 33) s 46 (1) which expressly excludes the councils of boroughs see *R v Rowlands* [1906] 2 K B 292).

(c) When the interest ceases is a question upon which there has been much divergence of opinion. It has been doubted whether the mere existence of a debt for goods supplied constitutes such an interest (*Re Gloucester Municipal Election Petition* 1900 *Ford v Newth* *supra*) and in one modern case it was expressly held that it does not (*Cox v Truscott* *supra* and see note (b) *supra* see also *Woolley v Kay* (1851) 1 H & N 307) but it is submitted that such decision is not sound and that the interest in the contract remains so long as the contract is unfulfilled on either side, see *O Carroll v Hastings* [1905] 2 I R 590).

## SECT 5

The  
Borough

## Assignment

An assignment of the benefits of a contract before election if a liability under the contract remains with the candidate (*d*) or an assignment of the contract between nomination and the date of the poll (*e*), or an assignment of a contract before the election without the privity of the local authority (*f*) will not remove the disqualification

Evidence of  
acting as a  
member

**629** The production of the minute book representing a person as having attended meetings and of the attendance book signed by him, is evidence of his having acted as a member of the authority (*g*) and the production of an invoice extending over a considerable period is sufficient evidence of the concern or interest in a contract (*h*)

Contracts  
which do not  
disqualify

**630** The disqualification does not attach to any share or interest in any lease sale or purchase of land or any agreement for the same (*i*) or in any agreement for the loan of money or any security for the payment of money only (*h*) or in any newspaper in which an advertisement relating to the affairs of the borough or council is inserted or in any company which contracts with the council for lighting or supplying with water or insuring against fire any part of the borough or in any railway company or any company incorporated by Act of Parliament or royal charter or under the Companies Acts (*l*) or in any society registered under the Industrial and Provident Societies Acts 1893 and 1895 (*m*)

Disqualifica-  
tion by office

**631** A mayor cannot be a candidate at an election of councillors where he is acting as returning officer (*n*)

(*d*) *Cox v Ambrise* (1890) 55 J P 23

(*e*) *Harford v Inskay* [1899] 1 Q B 852

(*f*) *R v Franklin* (1872) 61 R C L 239

(*g*) *Hummings v Williamson* (1883) 11 Q B D 533 C A

(*h*) *Nicholson v Ivelts* (1862) 7 H & N 810

(*i*) This includes the lease of a sewage farm granted by a local authority to one of its members with onerous covenants on both sides (*R v Gusharth* (1889) 5 Q B D 321). A letting for a single day is within the exception (see *Nell v Longbottom* [1894] 1 Q B 767)

(*k*) *Le Feuvre v Lunkester* (1854) 3 E & B 530 (defendant contracted to supply a town with water he assigned the contract and the uncompleted works to the town authority with the covenant *ut ter alia* that the authority would pay defendant £850 if they abandoned the works or having completed them should obtain a specified supply of water of a certain quality. The money remained unpaid when the defendant was elected and acted as mayor of the town but it was held that he was not disqualified because the covenant was a security for the payment of money only)

(*l*) Municipal Corporations Act 1889 (40 & 46 Vict c 50) s 12 (2). See *eg* *Todd v Robinson* (1884) 14 Q B D 739 C A. *City of London Electric Lighting Co v London Corporation* [1903] A C 434. As to the Companies Acts see title COMPANIES, Vol V pp 1 *et seq*

(*m*) Municipal Corporations Act 1906 (6 Edw 7 c 12) s 2 and see generally title INDUSTRIAL PROVIDENT AND SIMILAR SOCIETIES Vol XVII pp 1 *et seq*

(*n*) *R v Owens* (1859) 21 E 86 but the fact of his being *ex officio* the returning officer does not prevent his seeking election as councillor provided that he does not act as returning officer (*R v White* (1867) L R 2 Q B 557) see *Fanagan v Kernan* (1881), 8 L R Ir 44 and title ELECTIONS Vol XII p 340

The recorder of a borough is not, during his office, eligible to be an alderman or councillor of a borough (o)

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An officer of the regular forces on the active list cannot hold any office in any municipal corporation (p)

**632** A bankrupt cannot be elected to nor hold or exercise the office of mayor alderman, or councillor (q)

Bankrupts

(d) *Term of Office*

**633** Councillors are elected for three years (r) retiring councillors are eligible for re election unless disqualified (s)

Retirement

The charter of a new borough may fix the date of the first retirement of the councillors (t)

**634** A mayor alderman or councillor becomes immediately disqualified and ceases to hold office if he is declared bankrupt (a) or compounds by deed with his creditors (b) or makes an arrangement or composition with his creditors under the Bankruptcy Acts (c) by deed or otherwise (d) As regards subsequent elections the disqualification caused by a compounding or composition ceases on payment of the debts in full and when caused by an arrangement it ceases upon his obtaining his certificate of discharge (e)

Avoidance of  
office  
(i) by  
bankruptcy

(o) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 163 (6) see title MAGISTRATES p 544 *post*

(p) Army Act 1941 (44 & 45 Vict c 58) s 146 as amended by the Army (Annual) Act 1869 (32 & 33 Vict c 3) s 6 But an officer of the auxiliary forces can and his competence or liability to be nominated or elected to or to hold office of sheriff mayor or alderman or an office in a municipal corporation is not to be affected by reason of the battalion or corps to which he belongs being assembled for annual training at the time of such nomination or election or during the time of his tenure of office (Army Act 1881 (44 & 45 Vict c 58) s 181 (5)) and see generally title ROYAL FORCES

(q) Bankruptcy Act 1883 (46 & 47 Vict c 52) s 32 (1) (d) see as to removal of disqualification after discharge p 260 *ante* and title BANKRUPTCY AND INSOLVENCY Vol II pp 88 *et seq* and the text *infra*

(r) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 13 (1) (2) 5<sup>o</sup> The third who retire each year (see title ELECTIONS Vol XII pp 339 340) are those who have been longest in office without re election (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 13 (3)) As to casual vacancies see p 299 *ante*

(s) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 37

(t) *Ibid* s 212

(a) As to this see title BANKRUPTCY AND INSOLVENCY Vol II p 88

(b) A composition with creditors which was not by deed and was not under the Debtors Act 1869 (32 & 33 Vict c 62) was held not to disqualify under corresponding words in the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) s 5 (*Aslett v Southampton Corporation* (1880) 16 Ch D 143) An assignment by a debtor of all his property by deed to a trustee for the benefit of those creditors who should sign the deed without any sum by way of composition being mentioned is not a composition with creditors (*R v Cooban* (1886) 18 Q B D 269)

(c) See generally title BANKRUPTCY AND INSOLVENCY Vol II pp 1 *et seq*

(d) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 39 (1) (a) Bankruptcy Act 1883 (46 & 47 Vict c 52) s 34 The above provision does not disqualify the candidate for election (*R v Chitty* (1836) 5 Ad & El 609) but see now Bankruptcy Act 1883 (46 & 47 Vict c 52) s 32 as amended by the Bankruptcy Act 1890 (53 & 54 Vict c 71) s 9 and note (q) *supra*

(e) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 39 (3) As to the cessation of the disqualification by bankruptcy, see title BANKRUPTCY AND INSOLVENCY Vol II pp 89 91 269

## SECT 5

**The Borough**(it) by  
absence

**635** Continuous absence from the borough, except in case of illness on the part of an alderman or councillor (*f*) for more than six months and on the part of the mayor for more than two months disqualifies the officer and he thereupon ceases to hold office (*g*) and becomes liable to the same fine as for non acceptance of office recoverable summarily (*h*), but the disqualification, as regards subsequent elections ceases on his return (*i*)

Procedure on  
avoidance of  
office

**636** When a councillor thus (*j*) becomes disqualified the council must forthwith declare the office to be vacant and must signify the same by notice signed by three members of the council, countersigned by the town clerk and fixed on the town hall (*k*) Thereupon the office becomes vacant (*l*) but not before (*m*) No declaration appears to be necessary where actual bankruptcy supervenes since by the statute the office becomes *ipso facto* vacant (*n*) Upon the disqualification attaching it is not competent for the disqualified office holder to resign (*o*)

(iii) *The Aldermen*Election and  
retirement

**637** The number of aldermen is one third of the number of councillors (*p*) They are elected (*a*) by the councillors for six

(*f*) The absence on active service or on service beyond the seas of an officer or soldier of the auxiliary forces or of the reserve forces does not disqualify him nor vacate his office as a member of the borough council nor can it incur any fine or other liability (Members of Local Authorities Relief Act 1900 (63 & 64 Vict c 46) s 2) The expressions soldier reserve forces auxiliary forces active service and beyond the seas have the meanings respectively assigned to them by the Army Act 1841 (44 & 45 Vict c 58) ss 19, 190 (6) (9) (12) (20) see title ROYAL FORCES

(*g*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 39 (1) (b)

(*h*) *Ibid* s 39 (4) As to fine on non acceptance of office see p 36 ante

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 39 (4)

(*j*) See p 307 *supra* and the text *supra*

(*k*) It must be fixed in some conspicuous place on or near the outer door of the town hall or where there is no such hall in some conspicuous place in the borough or ward to which the notice relates (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 232) In the case of disqualification by absence the absenting member must be given an opportunity of explaining his absence before proceedings can be taken to elect another member see *Richardson v Methley School Board* [1893] 3 Ch 510

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 39 (2) This procedure applies only in the case of a disqualification under *ibid* s 39 compare the procedure on resignation see p 298 ante As to disqualification arising from bankruptcy see note (*n*) *infra*

(*m*) *R v Leeds Corporation* (1838) 1 Ad & El 963 *R v Helthorpe Corporation* (1876) 35 L T 594 *Hardwick v Brown* (1813) 1 L R 80 P 406 see *Pease v Lowden* [1899] 1 Q B 356

(*n*) Bankruptcy Act 1883 (46 & 47 Vict c 52) s 34 If a person is adjudged bankrupt whilst holding the office of mayor alderman councillor his office shall thereupon become vacant

(*o*) *Hardwick v Brown* (1813) 1 L R 80 P 406 *Fletcher v Saunders* (1885) 49 J P 424

(*p*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 14 (2)

(*a*) See title ELECTIONS Vol XII pp 304 *et seq* an alderman of a municipal borough shall not as such vote in the election of an alderman of the borough (Municipal Corporations Amendment Act 1910 (10 Edw 7 & 1 Geo 5 c 19) s 1) As to their retirement and qualification see *ibid* see also *ibid* p 340, note (a) As to the order of retirement in the case of new boroughs see

years (b) A retiring alderman is eligible for re election unless otherwise disqualified (c) An alderman elected to and accepting the office of councillor vacates his office of alderman (d)

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Borough

The rules as to the disqualification of councillors owing to bankruptcy, insolvency and absence apply to aldermen (e)

Disqualifica  
tion

(iv) *The Mayor*

**638** The mayor (f) is elected (g) by the council from among the aldermen or councillors or persons qualified to be such (h) An outgoing mayor is eligible if not disqualified (i) and so is an outgoing alderman (h)

Election

**639** His term of office is for one year but he continues in office until his successor has accepted office and made and subscribed the necessary (l) declaration (m) and although the mayor is a councillor whose office expires on the 1st November (n) and therefore ceases to be a councillor he continues as a supernumerary member of the council until his successor as mayor has accepted office (o)

Term of  
office

**640** The council may grant to the mayor such remuneration as it thinks reasonable (p) Socially the mayor has precedence in all places in the borough (q) except in the city of Oxford and the borough of Cambridge where the mayors have not precedence over the vice chancellors of the universities (r)

Remunera  
tion social  
position

During his term of office and the year following unless he is disqualified to be mayor he is by virtue of his office a justice for

Position as  
magistrate  
and chief  
officer

Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 212 (1) (b) As to filling casual vacancies see p 299 *ante*

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 14 (1) (c)

(c) See p 303 *ante*

(d) *R v Bignor Corporation* (1886) 18 Q B D 349 C A

(e) See p 307 *ante*

(f) The title of lord mayor has in recent times been conferred by letters patent upon the chief magistrate *e.g.* in Manchester Liverpool Birmingham Bristol York Sheffield Leeds Norwich Bradford Newcastle on Tyne Cardiff

(g) See title ELECTIONS Vol XII p 357 As to a casual vacancy in the office of mayor see p 299 *ante*

(h) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 10 (1) But an outgoing alderman shall not as alderman vote in the election of a mayor (Municipal Corporations Amendment Act 1910 (10 Fdw 1 & 1 Geo 5 c 19) s 1 (1) As to the qualifications of aldermen and councillors see p 303 *ante* the text *supra* and title DIRECTIONS Vol XII pp 339 354

(i) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 37

(k) *Ibid* s 15 (2)

(l) *Ibid* ss 13 52

(m) *Ibid* s 10 (3)

(n) See title ELECTIONS Vol XII p 339

(o) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 38 *R v Owens* (1889) 2 E & E 80

(p) *Ibid* s 10 (4) As to additional remuneration on special occasions see *A G v Cardiff Corporation* [1894] 2 Ch 337 compare also *A G v Blackburn Corporation* (1887) 51 J F 385 (jubilee festivities) *A G v East Barnet Valley Urban District Council* (1911) 131 J T Jo 218 (coronation festivities)

(q) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 15 (5) *Ex parte Birmingham (Mayor)* (1860) 3 E & E 222 The mayor is not entitled to preside when sitting as a justice within the borough along with county justices transacting county business (*Lawson v Reynolds* [1904] 1 Ch 718)

(r) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 257 (2)



**SECT 8**  
**The**  
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the borough (s), and whilst mayor of a borough other than a county borough he is also a justice of the peace for the county in which the borough is situate (a) The mayor of a borough named in the Schedules to the Municipal Corporations Act, 1835 (b), is the successor of and represents the chief officer of the borough (c)

**Disqualifica**  
**tion**

**641** The rules as to the disqualification of councillors by bankruptcy, insolvency or absence apply to the mayor (d)

(v) *The Deputy Mayor*

**Appointment**

**642** During the illness or absence of the mayor he may appoint an alderman or councillor to act as his deputy (e) who may do all acts which the mayor might do except that of taking the chair at the council unless specially appointed by the meeting to do so (f), and except that of acting as a justice or in any judicial capacity unless he is a justice (g)

(vi) *owers of the Council*

**Nature of**  
**powers**

**643** The council exercises all powers which are vested in the corporation (h) The powers and duties possessed by or imposed on the municipal corporation may consist of those conferred or imposed upon it by the terms of its charter or by prescription, or by statute The last include those powers and duties which it may or must exercise under statutes specially relating to municipal corporations (i), or which it may or must exercise as being the local authority appointed to carry into execution the provisions of a statute relating to particular subjects (k), and those conferred upon it as an urban district council by the Local Government Act, 1894 (l)

(a) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 155 (1) Before acting he must take the oaths required to be taken by justices (*ibid* s 15 (2)) and see title MAGISTRATES p 539 *post* The mayor is entitled to act as such justice whether the borough has a separate commission of the peace or not (*Wilson v Strugnell* (1881) 1 Q B D 545) Although a woman may be elected mayor she cannot by virtue of her office be a justice of the peace (Qualification of Women (County and Borough Councils) Act 1901 (7 Edw 7 c 33) s 1)

(c) Local Government Act 1974 (56 & 57 Vict c 73) ss 22-30 As to the qualifications and oaths of justices see title MAGISTRATES pp 538 *et seq post* As to the precedence of the mayor as a justice see Municipal Corporations Act 1892 (45 & 46 Vict c 50) s 155 (2) *Lawson v Reynolds* [1904] 1 Ch 718 and title MAGISTRATES p 540 *post*

(b) 5 & 6 Will 4 c 16

(c) Municipal Corporations Act 1892 (45 & 46 Vict c 50) s 15 (6) as to the saving for existing corporations see *ibid* s 250

(d) See p 30, *ante*

(e) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 16 (1) The appointment must be signified to the council in writing and be recorded in its minutes (*ibid* s 16 (2)) A defect in his appointment does not invalidate his acts (*ibid* s 237) As to the appointment of a deputy mayor to act in elections when the mayor is absent or dead see title ELECTIONS Vol XII p 340

(f) Municipal Corporations Act, 1882 (45 & 46 Vict c 50) s 16 (a) Sched II r 9

(g) *ibid* s 16 (3)

(h) Whether by the Municipal Corporations Act 1882 or otherwise (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 10 (1))

(i) See under the Municipal Corporations Acts

(k) See titles included in list of cross references at pp 233-236 *ante*

(l) 56 & 57 Vict c 73 s 21 (3) As to these conferred powers see p 311 *post*

Certain powers possessed by parish councils under the Local Government Act, 1894(*m*) may be conferred upon a borough council or any representative body within the borough by an order of the Local Government Board on the application of the council or any representative body in the borough. This applies equally to a county borough (*m*)

### SECT 3 The Borough

Powers conferred by Local Government Act 1894

The powers duties and liabilities of justices and quarter sessions transferred to urban district councils are transferred to county boroughs as if they were urban districts and as if their councils were district councils (*n*)

**644** The powers and duties exercisable as a municipal corporation include the appointment of officers (*o*) the regulation of the meetings and proceedings of the council (*p*) the framing of bye laws (*q*) the acquisition and holding of land (*r*) stock and other property including advowsons (*s*) the maintenance of bridges (*t*) the levying of rates (*a*) the control and expenditure of the borough fund (*h*) the power of borrowing (*c*) the control of the borough police (*d*)

Powers under Municipal Corporations Act 1882

**645** The council is the authority for the purpose of enforcing the Public Health Acts (*e*) and all the powers and duties formerly exercised in a borough under local Acts became in 1875 vested in and exercisable by the borough council (*f*). The Local Government Board has power by provisional order to repeal or amend any such local Act (*g*)

Under Public Health Acts

**646** When an urban district or part thereof is constituted or included in a borough all the statutory powers rights liabilities and property exercisable by or attaching to or vested in the urban district council pass to and become exercisable by, and vested in, the council of the borough (*h*)

On conversion of urban district into borough

### SUB SECT 5—Officers

**647** The officers of the council all of whom should be appointed Officers.

(*m*) 26 & 27 Vict c 73 s 33

(*n*) *Ibid* s 32. The powers transferred are those mentioned in *ibid* s 27 for which see p 266 *ante*

(*o*) See the text *infra*

(*p*) See p 314 *post*

(*q*) See p 328 *post*

(*r*) See p 318 *post*

(*s*) See p 295 *ante*. As to advowsons and ecclesiastical patronage see title ECCLESIASTICAL LAW Vol XI pp 509 *et seq*

(*t*) See title HIGHWAYS STREETS AND BRIDGES Vol XVI p 189

(*a*) See title RATES AND RATING

(*b*) See p 319 *post*

(*c*) See p 317 *post*

(*d*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 190—196 and see title POLICE

(*e*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*f*) Public Health Act 1875 (38 & 39 Vict c 55) s 10. Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 133—138 see also *Kuddermister Corporation v Court* (1959) 1 L & E 770

(*g*) Public Health Act 1875 (38 & 39 Vict c 55), s 303

(*h*) *Ibid*, s 310

**SECT 5**  
**The**  
**Borough**

**Remunera**  
**tion**

under seal (i) consist of the town clerk (k) the treasurer (l), the clerk of the peace in a quarter sessions borough (m), and such other officers as by the council may be thought necessary (n)

The remuneration of the officers which is fixed by the council (o), covers all duties which are imposed by statute upon them (p) Subject to this the remuneration and the right to payments for work not specifically mentioned in the agreement are governed by the terms and the construction of the appointment (q)

**Security**

Officers must give security for the due execution of their offices (r)

**Town clerk**

**648** The appointment of a town clerk by the council is compulsory, and a vacancy in the office must be filled within twenty one days of its occurrence and the person appointed must not be a member of the council nor treasurer nor elective auditor (s)

**Duties.**

The town clerk holds office during the pleasure of the council (t) He has charge and custody of and is responsible for the charters, deeds records and documents of the borough, which must be kept according to the directions of the council (a)

**Deputy**

The council may during the illness or absence of the town clerk appoint a deputy who holds office at the pleasure of the council (b),

(i) See *Arnold v Iole Corporation* (1842) 4 Man & G 860 *R v Stamford Corporation* (1844) 6 Q B 433 *Smith v Cartwright* (1851) 6 Exch 927 Where however proceedings were taken by *certi rari* under the Municipal Corporation (General) Act 1837 (7 Will 4 & 1 Vict c 18) s 44 to decide the validity of certain payments made to the town clerk by a corporation it was held that it was no objection at least after payment that the retainer for extra services was not under seal (*R v Prest* (1870) 16 Q. B 32 and as to this case see also p 320 *post*)

(k) See the text *infra*

(l) See p 313 *post*

(m) As to the clerk of the peace see title MAGISTRATES p 624 *post*

(n) Any unnecessary officer may be discontinued (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 19)

(o) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 20

(p) For example a town clerk was held not entitled to extra remuneration for business done in pursuance of the directions of the Reform Act (5 & 6 Will 4 c 76) (*Jones v Carmarthen Corporation* (1841) 8 M & W 605)

(q) See *Thomas v Swansea Corporation* (1842) 2 Dowl (N s) 410 *R v Prest supra*

(r) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 20 As to sureties and the form of guarantee see p 275 *ante* As to the liability of officers to account see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 21 *R v Downes* (1875) 1 Q B D 25 *Lichfield Corporation v Simpson* (1845) 8 Q B 50

(s) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 17 18 20 A town clerk has no lien on documents held merely by virtue of his office but has a lien on the papers of a corporation with respect to which he has done work as a solicitor (*R v Sankey* (1836) 5 Ad & El 423) and see generally titles LIEN pp 1 *et seq ante* SOLICITORS

(t) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 17 (2) The effect of holding office at the pleasure of the council is that the official can be dismissed at any time without notice and without any reason being given see *Hayman v Rugby School (Governors)* (1874) L R 18 Eq 28 *per MALINS V C* at p 66 *Ex parte Richards* (1818) 3 Q B D 368

(a) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 17 (3) for the duties of the town clerk in connection with registration of voters and elections see title ELECTIONS Vol XII p 131

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 17 (5) and see note (f), *supra*

**SECT 5**  
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and by or to whom all things required or authorised by law to be done by or to the town clerk may be effected (c) A defect in his appointment does not invalidate his acts (d) In the event of there being no town clerk and no deputy town clerk, or if they are incapable of acting, the mayor may appoint someone for the purpose of all acts required to be done by or with respect to the town clerk (e)

**649** The appointment of a treasurer is compulsory and a vacancy in the office must be filled within twenty one days of its occurrence (f) He must not be town clerk nor a member of the council (g) nor an elective auditor (h) and he holds office during the pleasure of the council (i) In the event of there being no treasurer or of his incapacity to act the mayor may appoint someone for the purpose of all acts authorised or required to be done by or with respect to the treasurer (k)

**Treasurer**

He is responsible for the borough fund and all payments to or out of the fund are made by him (l) His position is that of a trustee and not of a servant to the council and it is his duty to disobey orders which are unlawfully made upon him by the council (m) If proceedings are necessary to collect or safeguard moneys which ought to be paid to the borough fund, he and he alone is the proper person to take them (n)

**Duties**

As an urban authority, under the Public Health Acts (o) the borough council is required to appoint the officers necessary for the execution of their statutory powers (p) and the provisions relating to the disabilities of such officers equally apply (q)

**Officers under Public Health Acts**

**SUB SECT 6—Contracts**

**650** The contracts of the council are governed by the general law relating to the contracts of corporations (r) and although a municipal corporation when acting as an urban sanitary authority is one corporate body (s) it is when so acting governed by the provisions which regulate contracts made by such authorities (t)

**Contracts**

(c) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 17 (6)

(d) *Ibid* s 23

(e) *Ibid* s 43

(f) *Ibid* ss 15 (1) (3) 230 (1)

(g) *Ibid* s 18 (1)

(h) *Ibid* s 27 (2)

(i) *Ibid* s 16 ( ) As to the effect of this see note (t) p 312 ante

(k) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 43

(l) *Ibid* s 142 (1)

(m) *A G v De Hinton* [1906] 2 Ch 106

(n) *H v Frost* (1835) 8 Ad & El 822 In this case a mandamus was refused to a burgess who was seeking to compel the mayor to account for rents of corporate lands on the ground that the treasurer was the proper person to take action

See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(p) See p 212 ante

See p 214 ante

See title CORPORATIONS Vol VIII pp 379 et seq

*Andrews v Ryde Corporation* (1874) L R 9 Exch 302

(q) *Fining & Co v Royal Leamington Spa Corporation* (1883) 8 App Cas 517 For the statutory provisions relating to contracts of urban sanitary authorities, see p 268 ante

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Meetings

SUB SECT 7—*Proceedings*(1) *Of the Council.*

**651** The meetings and proceedings of the council are regulated by statute (*u*) but subject thereto, the council may make vary, and revoke standing orders for the regulation of its proceedings and business (*a*) There must be four quarterly meetings in each year for the transaction of general business (*b*) the first being held at noon on the 9th November or on the 10th if the 9th be a Sunday (*c*), and the others on such dates and at such times as the council may by standing order determine (*d*) Other meetings may be convened by the mayor on his own initiative or on a written requisition signed by five members of the council and on his refusal or on his neglect for seven (*e*) days after the presentation of the requisition to do so any five members may convene a meeting (*f*) Three clear days (*g*) notice of any meeting stating the time and place thereof must be fixed on the town hall (*h*) The notice must be signed by the mayor or the five members as the case may be and in the latter event it must specify the business to be transacted (*i*)

## Summoning

**652** A summons to attend a meeting must be issued and left or delivered by registered post at the usual place of abode of each member of the council at least three clear days (*l*) before the meeting It must be signed by the town clerk and must specify the business proposed to be transacted at the meeting (*l*) Want of service of a summons on any member does not affect the validity of the meeting (*m*)

No business can be transacted at a meeting which is not specified in the summons except in the case of a quarterly meeting at which

(*u*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 22 (1) and Sched II which last is to be read and have effect as part of the Act (*ibid* s 7 (4)) Meetings must not be held on licensed premises (Local Government Act 1891 (56 & 57 Vict c 1) ss 21 (3) 61)

(*a*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) Sched II 13 If an action be brought to restrain a council from acting contrary to its standing orders the proceedings must be in the name of the Attorney General (*Hatton v Hythe Trough Council* (1906) 70 J P 153) and see title CORPORATIONS Vol VIII pp 364 365

(*b*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) Sched II 1

(*c*) *Ibid* s 230 or a day appointed for public fast humiliation or thanks giving (*ibid*)

(*d*) *Ibid* Sched II 2

(*e*) See note (*g*) *infra*

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict. c 50) Sched II 3 4

(*g*) Exclusive of the day of publication and of the day of the meeting Sundays and the other days mentioned in *ibid* s 230 (see note (*c*) *supra*) are not to be reckoned (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 230) As to periods of time generally see title TIME

(*h*) As to fixing on the town hall see note (*k*) p 308 *ante*

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict. c 50) Sched II 5

(*k*) See note (*g*) *supra*

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) Sched II 6

(*m*) *Ibid* Sched II, 7

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business prescribed by the statute may also be transacted (*n*) In case a quarterly meeting is adjourned in order to complete unfinished business no other business can be transacted at the adjourned meeting, unless notice of it has been given in the summons of that adjourned meeting (*o*)

**653** The mayor is the chairman at all meetings In his absence the deputy mayor may be chosen to preside but only if specially appointed to do so (*p*) Failing the presence of the mayor or the presence and choice of the deputy mayor an alderman or in the absence of all the aldermen, a councillor may be chosen as chairman (*q*)

Chairman

**654** All questions are decided by a majority of the members voting provided that the whole number of members present, whether voting or not is not less than a third of the council (*r*) except in the matter of making bye laws for which purpose there must be a quorum of two thirds of the council present (*s*)

Conduct of  
business

The chairman if not disqualified from voting (*t*) has a second or casting vote in the event of the votes being equal (*a*) and he may give a conditional casting vote to operate in the event of the voting being equal (*b*)

Casting vote

No member may vote or take part in the discussion of any matter before the council in which he has directly or indirectly by himself or his partner any pecuniary interest (*c*) but no penalty is imposed in the event of his so doing and the council has no power to remove him (*d*)

Disqualifica-  
tion from  
voting

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) Sched II 8 Such business relates to the quarterly meeting in November The order of business at that meeting is the election of the mayor (*ibid* s 61 (?) see p 309 *ante*) the appointment of sheriff (if any) (*ibid* s 170 (2)) the election of aldermen (*ibid* s 60 (2) see p 308 *ante*) As to the necessity of preserving this order see title ELECTIONS Vol XII p 352 The appointment of an alderman for the purpose of returning officer at a ward election is also part of the business at this meeting (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 6.)

(*o*) *R v Grimshaw* (1841), 10 Q B 747

(*p*) Municipal Corporations Act 1862 (45 & 46 Vict c 50) s 16 (3)

(*q*) *Ibid* s shed II 9

(*r*) *Ibid* Sched II 10

(*s*) *Ibid* s 23 (2) In certain cases special majorities are required see the Borough Funds Act 1842 (35 & 36 Vict c 91) Honorary Freedom of Boroughs Act 1885 (48 & 49 Vict c 39) s 1 Municipal Corporations Act 1893 (56 & 57 Vict c 9) s 2 County Police Act, 1840 (3 & 4 Vict c 85) s 14

(*t*) See the text *infra*

(*a*) Municipal Corporations Act 1882 (45 & 46 Vict c 50), Sched II 11 In two instances a casting vote is given to the chairman at a council meeting although for some reason he has no first vote namely in the election of aldermen (*ibid* s 60 (6) as amended by the Municipal Corporations Act 1910 (10 Edw 7 & 1 Geo 5 c 19) s 1 (2)) and of mayor (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 61 (4)) As to these see title ELECTIONS Vol XII pp 353 355

(*b*) *Blind v Buchanan* [1901] 2 K B 75

(*c*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 22 (3) See also the cases referred to under *ibid* s 12 p 304 *ante*.

(*d*) *R v Ryde Corporation* (1873) 31 J P 725 As the council is not acting judicially the intervention of a disqualified councillor does not vitiate the proceedings (see *Murray v Epsom Local Board* [1897] 1 Ch 30) When acting judicially the presence of a person interested in the question discussed may vitiate the proceedings (see *R v London County Council Ex parte Alkerdyk Ex parte Formosa*, [1892] 1 Q B 190)

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**The**  
**Borough**  
**Minutes.**

**655** Minutes of the proceedings of every meeting must be drawn up and entered in a book kept for that purpose (e) and signed at the same or the next ensuing meeting by the mayor or by a member of the council describing himself as or appearing to be chairman of the meeting at which the minutes are signed and when so authenticated they are receivable in evidence without further proof (f) Until the contrary is proved every meeting in respect of the proceedings of which a minute has been so made is to be deemed to have been duly convened and held and all the members of the meeting are to be deemed to have been duly qualified (g)

**Inspection of**  
**minutes of**  
**council**

The minutes are open to the inspection of a burgess at any reasonable time during the ordinary hours of business on payment of 1s and he may make a copy thereof or take an extract therefrom (h) and this also applies to minutes of committees which have been submitted to the council for approval and whether they have or have not been approved (i)

**Admission of**  
**public**

**656** Neither the public nor the burgesses nor representatives of the Press have any common law right to attend the meetings of the council unless the council expressly or impliedly consents to such attendance (k)

(u) *Of the Committee*

**Appointment**

**657** The council may appoint committees in its discretion (l) The committees may be either of a general or a special nature and may consist of such number of councillors as the council may think fit The acts of every committee must be submitted to the council for its approval (m) and this approval may be given although the acts approved have already been done (n)

**Delegation of**  
**powers**

The delegation of powers by a council to a committee is not an

(e) Municipal Corporations Act 1862 (45 & 46 Vict c 50) Sched II 12

(f) *Ibid* s 22 (a) As to forgery of the signature to any minute or the tendering in evidence of minutes knowing that the signature is false or counterfeited see title CRIMINAL LAW AND PROCEDURE Vol IX p 740

(g) *Ibid* s 22 (6)

(h) Municipal Corporations Act 1862 (45 & 46 Vict c 50) s 233 (1) (6) Obstruction of inspection or refusal to give copies or extracts to persons entitled is punishable on summary conviction by a fine not exceeding £5 (*ibid* s 233 (7)) As to enforcement of orders made on summary conviction see title MAGISTRATES p 601 *post*

(i) *Williams v Manchester Corporation* (1897) 45 W R 41 As to the inspection of books accounts and documents of a district council see p 280 *ante* and *R v Godstone Rural District Council* [1911] 2 K P 46 (inspection of brief and opinion obtained with the view of defending threatened proceedings refused)

(k) *Lea by Corporation v Mason* [1908] 1 Ch 457 C A As to the admission of Press representatives see title PRESS AND PRINTING

(l) As to the power to resign from a committee see *R v Sunderland Corporation* [1911] 2 K B 458 For special provisions relating to watch committees see p 321 *post* and title POLICE As to education committees see title EDUCATION Vol XII p 19

(m) Municipal Corporations Act 1862 (45 & 46 Vict c 50) s 22 (2) As to proceedings of committees see *ibid* s 22 (4) (6) If a contract which requires a seal is entered into by a committee not appointed under seal and it is not ratified by the council under seal it is invalid (*Oxford Corporation v Crow* [1893] 3 Ch 535)

(n) *Kirby v Staines* [1897] 2 Q B 70

absolute resignation of powers to the latter and they may be resumed by the council at any time (o) A committee cannot delegate its powers to a sub committee nor to any of its members (p)

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SUB SECT 8—*Borrowing Powers*

**658** The council's powers of borrowing are regulated by statute and unauthorised borrowing may be restrained by injunction (q) Under the Municipal Corporations Act 1882 (r) the council may borrow money for the purchase of land or the erection of authorised buildings (s) for building and maintaining municipal buildings (t) and for maintaining and improving borough bridges (a) As sanitary authority the council may borrow for the purposes of their powers and duties (b) The council in common with other authorities has wide powers of borrowing conferred by many statutes (c) including the Borough Funds Acts 1872 and 1903 (d)

General

**659** In the case of loans secured by mortgage or charge for the purchase of land or in connection with municipal buildings and borough bridges the Local Government Board may as a condition of its approval of such loans require that the principal and interest be repaid in thirty years or any less period either by instalments or by means of a sinking fund or both (e) In that case the sums required for repayment become a statutory charge on all or any of the following securities namely the land comprised

Repayment  
of loans

(o) Compare *Huth v Clarke* (1890) 25 Q B D 391

(p) See *Cook v Ward* (1811) 2 C P D 55 C A

(q) *A G v De Winton* [1906] 2 Ch 106 (overdraft at bank for unauthorised purpose) and see title INJUNCTION Vol XVII p 225

(r) 45 & 46 Vict c 50 which contains provisions relating to the payment of loans and investments existing previous to 1882 (see *ibid* ss 125—127 129—132 and the following cases thereunder *Payne v Biezon Corporation* (1858) 3 H & N 512 *Holdsworth v Dartmouth Corporation* (1840) 11 Ad & El 490 *Lallister v Gravesend Corporation* (1850) 9 O B 774 *Arnold v Gravesend Corporation* (1856) 2 K & J 574 *Hallett v Brighton Overseers* (1851) 7 E & B 342 *Great Western Rail Co v Maidenhead Town Council* (1862) 11 O B (N S) 653)

(s) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 106 The security may be a mortgage of land held or proposed to be purchased under its statutory powers or the borough fund or rate (*ibid*) The approval of the Local Government Board is necessary (*ibid* as modified by the Local Government Act 1888 (51 & 52 Vict c 41) s 72) As to the manner of obtaining this approval see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 236 As to the borough fund and borough rate see pp 319 320 *post*

(t) *Ibid* s 120 The money may be borrowed from the Public Works Loan Commissioners The council may levy a special rate or an increase of the borough rate for the purpose and the security may be a mortgage of those rates (*ibid*) As to rating generally see title RATES AND RATING

(a) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 119 (3) (4) see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 189 190

(b) See p 262 *ante*

(c) *See* p 4 q see titles BURIAL AND CREMATION Vol III p 486 EDUCATION Vol XII p 51 ELECTRIC LIGHTING AND POWER Vol XII pp 553 554 PUBLIC HEALTH AND LOCAL ADMINISTRATION TRAMWAYS AND LIGHT RAILWAYS

(d) 35 & 36 Vict c 91 3 Edw 7 c 14 see p 380 *post*

(e) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 112 (1), as modified by the Local Government Act 1888 (51 & 52 Vict c 41) s 72



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Sinking fund

in the mortgage without prejudice to the security thereby created, or any other corporate land or the borough fund, or the borough or other rates legally applicable to payment of the money borrowed or the expenses to be so defrayed as the Board directs (*f*)

The sinking fund if any, is created by investing out of the rents and profits of the land or out of the borough fund or rates on which the sums required for the sinking fund are charged such sums, at such times and in such Government annuities as the Board directs and by investing in like manner the dividends of those annuities (*g*) The sums required may also be invested in trustee investments (*h*)

SUB SECT 9—*Sinking Land*

Power to  
purchase and  
hold land

**660** A municipal corporation may purchase and hold any land not exceeding five acres either within or out of the borough, and upon that or any other land belonging to or held in trust for them may erect any building necessary or proper for any purpose of the borough (*i*)

Where the corporation has no power to purchase or acquire land nor to hold land in mortmain it may purchase or acquire land with the approval and subject to the conditions of the Local Government Board (*h*) but such approval is not necessary for the purpose of acquiring such terms of holding as do not fall within the statutes relating to mortmain (*l*)

Disposal of  
land etc

Corporate land may with the approval of the Local Government Board be disposed of by the council in such manner and on such terms and conditions as the Board impose (*m*)

Without such approval or statutory authority a council cannot sell mortgage, or alienate corporate land (*n*) nor lease it except for certain specified terms and purposes (*o*) or for the renewal of

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 112 (1) As to the manner in which loans are discharged see Local Loans Act 1870 (38 & 39 Vict c 83) s 13

(*g*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 113 (1) As to the annuities their transfer and dividends see *ibid* s 113 (2)—(*o*)

(*h*) See Trust Investment Act 1859 (52 & 53 Vict c 32) s 7 Trustee Act 1893 (56 & 57 Vict c 53) s 1 see also title TRUSTS AND TRUSTEES

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 105 where certain buildings are enumerated. As to the gaols houses of correction lunatic asylum courts of justice and judges lodgings which on 31st December 1882 belonged to or were part of the county see *ibid* s 228 (3) (4)

(*k*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 107 (1) as modified by the Local Government Act 1888 (51 & 52 Vict c 41) s 12 Certain sections of the Lands Clauses Consolidation Acts are made applicable thereto (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 107 (2)) and see title CHARITIES Vol IV p 137

(*l*) *Iruru Corporation v Howe* [1901] 2 K B 870 and as to the statutes relating to mortmain see titles CHARITIES Vol IV pp 121 *et seq* 137 *et seq* CORPORATIONS Vol VIII pp 361 *et seq*

(*m*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 109 113—115 236 as modified by the Local Government Act 1888 (51 & 52 Vict c 41) s 12 The land may be disposed of in consideration of a perpetual yearly chief rent instead of a cash payment (*Scarborough Corporation v Cooper* (1909), 101 L. T. 552)

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 108 (1)

(*o*) See *ibid* s. 108 (2) and as to renewal of leases see *ibid*, s 110

leases under covenants or usages existing on the 5th June, 1835, or where such renewals were ordinarily exercised before that date (*p*)

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SUB SECT 10—*The Borough Fund*

(1.) *Payments in*

**661** The borough fund is created by paying into it the rents and profits of all corporate land the interest dividends and annual proceeds of all money dues chattels and valuable securities belonging or payable to the corporation or to any member or officer thereof in his corporate capacity every fine or penalty for any offence under the Municipal Corporations Act 1882 (*g*) unless it is otherwise to be applied (*g*) the proceeds of sale of the parish burgess lists the lists of claimants and respondents and the burgess roll (*r*) dividends and interest of corporate stock and money to which the corporation is beneficially entitled (*s*) sums levied by the borough rate (*t*) portions of the surplus of the proceeds of duties on local taxation licences and the probate duty grant (*a*) moneys raised by a watch rate or separate rate raised in the part of a parish liable to watch rate (*b*) and other sums specially directed by statute to be so paid Purchase moneys arising from the sale of corporate lands cannot be paid into the fund for the discharge of corporate debts (*c*)

Constitution  
of borough  
fund

(11.) *Payments out*

**662** Payments out of the borough fund are made by the treasurer (*d*) and are regulated and limited by statute The application of moneys to purposes not warranted is a breach of the trust reposed in the corporation and persons procuring such breach of trust may be made personally liable for the same (*d*) and the corporation may be restrained therefrom by injunction (*e*)

How made

and *A G v Great Yarmouth Corporation* (1855) 21 Beav 625 A lease for life given in exchange for an old lease surrendered requires the approval of the Local Government Board (*Canterbury Corporation v Cooper* (1909) 13 J P 22) C A and see this case as to the effect of such an arrangement The like approval is required to restrictive covenants as well as an actual transfer (*Davies v Leicester Corporation* [1894] 2 Ch 208 C A)

(*p*) There are also limited powers of leasing for special purposes *e.g.* recreation grounds and workmen's dwellings for which see titles OPEN SPACES AND RECREATION GROUNDS PUBLIC HEALTH AND LOCAL ADMINISTRATION As to the application of purchase money see Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 114 116 117 *re Derby Municipal Estates* (1876) 3 Ch D 289

(*g*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 139 As to penalties see pp 325 *et seq post*

(*r*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 48 (2) and see title ELECTIONS Vol XII pp 240 246 247

(*s*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 118 (5)

(*t*) *Ibid* s 149 and see p 320 *post*

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 23 (9)

(*b*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 200 see, further titles POLICE RATES AND RATING

(*c*) *Ex parte Hythe Corporation* (1840) 4 Y & O (EX.) 55

(*d*) *A G v Wilson* (1842) Cr & Ph 1

(*e*) *A G v Aspsall* (1837) 2 My & Cr 613 *A G v Norwich Corporation* (1837) 2 My & Cr 406 *Arnold v Gravesend Corporation* (1856) 2 K & J 574 *A G v Newcastle upon Tyne Corporation and North Eastern Rail Co*

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The  
BoroughWhen order  
of council  
necessary

**663** Payments out of the fund may not be made without an order of the council except in the following cases —the remuneration of the mayor, recorder, stipendiary magistrate town clerk treasurer, salaried clerk of the peace all other council officers, and the clerk to the justices, remuneration and allowances certified by the Treasury in respect of election petitions and remuneration certified by the recorder to be due to an assistant recorder assistant clerk of the peace or additional clerk (*f*) or where the payment is (1) made under statutory authority or (2) made out of the surplus of a fund for improvements (*g*) or (3) paid under a lawful order made by a court of quarter sessions or justices (*h*)

Requirements  
of order

**664** All orders for payment made by the council must be signed by three members thereof and countersigned by the town clerk (*a*) The order may be removed into court by writ of *certiorari* (*k*) and the resolution authorising a payment may be so removed before any order has been drawn up and signed (*l*) The order may also be challenged by applying for an injunction to restrain the expenditure (*m*)

## SUB SECT 11 —The Borough Rate

Description

**665** The borough rate is the source of revenue by which the borough fund is replenished when the fund is insufficient for the purposes for which it is legitimately applicable and with which after a careful estimate has been made of the amount the existing fund will suffice for these purposes (*n*) It must be strictly limited

(1889) 23 Q B D 492 C A affirmed [1892] A C 568 4 G v *Manchester Corporation* [1906] 1 Ch 643 A G v *De Winton* [1906] 2 Ch 106 and see title INJUNCTION Vol XVII p 225

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 140 (1) (2) Sched V Part I

(*g*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 143 (1) As to what is or is not for the public benefit of the inhabitant see 4 G v *Cardiff* [1894] 2 Ch 337 *Tynemouth Corporation v A G* [1899] A C 293 A G v *Liverpool Corporation* (1872) 41 L J (Q B) 111

(*h*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 140 (3) As to orders of courts of quarter sessions or justices see titles CRIMINAL LAW AND PROCEDURE Vol IX pp 445 *et seq* MAGISTRATES pp 602 *et seq* 639 *et seq post* As to payments under the Public Health Acts see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 141 (1)

(*k*) *Ibid* s 141 (1) see title CROWN PRACTICE Vol X pp 113 192 The court may order the persons signing the order to pay the costs of the proceedings (*R v Vaule* (1889) 23 Q B D 453) The order for payment will not be quashed on the ground that the contract under which it is to be made was not under seal (*R v Prentiss* (1870) 16 Q B 32 and see pp 268 312 *ante*) nor will it be quashed if the council made it under a *bond fide* exercise of discretionary powers (*R v Brighton Corporation Ex parte Shiosmith* (1907) 96 T 762 C A)

(*l*) *R v Ickfield Corporation* (1843) 4 Q B 893

(*m*) See title INJUNCTION Vol XVII p 225 *Tynemouth Corporation v A G* [1899] A C 293

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 144 (1) For assessment and levy of the rate see Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 144 150 235 title RATES AND RATING As to the watch rate see Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 197—200 titles POLICE RATES AND RATING

to those purposes (o) and cannot be used to create a fictitious surplus in order to effect improvements to which the surplus of the borough fund may be devoted (p)

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The rate may be retrospective, and the estimate may include both future and past expenses (q) subject to the limitation that the retrospective rate can only be raised in respect of the payment of charges and expenses incurred or which have come in course of payment, within six months before the making of the rate (r)

**666** If, before 1835 a rate was leviable in a borough for the purpose of watching (s) conjointly with other purposes the rate may be levied for those other purposes solely, and any statutory provisions existing before 1835 in respect of those purposes remain unaffected The rate however is limited If before 1835 it could not exceed a given rate in the pound on the value or property rateable thereto the rate leviable for the other purposes solely cannot exceed such proportion of that given rate as appears to have been expended for those other purposes by an account of the average yearly expenditure during the seven years previous to 1835 or during those of the same seven years during which the rate was levied (t)

Special rates

SUB SECT 12—*The Watch Committee*

**667** The watch committee consists of the mayor as an *ex officio* member and such other members of the council not exceeding a third of their total number as the council may appoint Three form a quorum the committee acting by a majority of those present (a) The watch committee is responsible for the appointment, control, and management of the borough police (b)

Constitution  
and purpose.

SUB SECT 13—*Freemen*

**668** Before the year 1835 there existed in the corporate boroughs a certain class of persons known as freemen (c) They formed a constituent part of the corporation and as such enjoyed special rights in the corporate property (d) The right to be admitted as freemen

Former  
position

(o) See p 319 *ante*

(p) *A G v Newcastle upon Tyne Corporation and North Eastern Rail Co* (1889) 23 Q B D 492 O A As to utilising the surplus of the borough fund see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 143 and p 310 *ante*

(q) *R v Workshop Local Board of Health* (1865) 5 B & S 951 and see the cases cited in notes (g) (h) (i) p 281 *ante*

(r) Municipal Corporations Act, 1882 (45 & 46 Vict c 50) s 144 (3)

(s) As to the watch rate see titles POLICE RATES AND RATING

(t) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 123

(a) *Ibid* s 190 see generally, title POLICE

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 191 and see titles POLICE RATES AND RATING

(c) As to the right of freemen to vote see title ELECTIONS Vol XII pp 178 *et seq* 189

(d) See *Lincoln Corporation v Holmes Common* (1867), L R 2 Q B 482 As to the rights of freemen when a portion of the common property was taken by a railway company under compulsory powers see *Nash v Coombs* (1868) L R 6 Eq 51 Freemen now possess much the same rights of sharing in property as they possessed before 1835 As to these rights see Municipal Corporations Act 1882 (45 & 46 Vict c 50), ss 205 (2) 206 (1)(2), 207 208 As to the effect

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rested upon the custom of the borough varied by the terms of its charter (e) Generally, the freedom of the borough might be acquired by birth servitude to a freeman, purchase gift, or marriage

In 1835 the freemen ceased to be a part of the body corporate (f), but their existing rights to benefit from the property of the borough or body corporate and from the borough charities were preserved (g)

**Present**  
**meaning of**  
**freeman**

The term 'freemen' now includes every person who had become such before 1835 or might have been admitted otherwise than by gift or purchase, as such if the Municipal Corporations Act, 1835 (h) had not been passed and every person who in and since 1882 was or is an inhabitant of a borough or the wife widow son or daughter of a freeman or husband of a daughter or widow of a freeman or is bound an apprentice (i)

**Claim to**  
**admission :**  
**freemen**

**669** A person claiming to be admitted a freeman in respect of birth servitude (namely apprenticeship) or marriage must make good his claim which is examined by the mayor, and when the claim is established the claimant is entitled to be placed on the freemen's roll (k)

**Honorary**  
**freedom**

**670** The honorary freedom of a borough may be conferred on persons of distinction and persons who have rendered eminent services to the borough but such freedom does not entitle them as such to a vote at parliamentary or other elections or to share with other freemen the benefits of property The privilege cannot be conferred unless authorised by at least two thirds of the number of the council present and voting at a meeting specially called for and with notice of the purpose (l)

**SUB SECT 14 — Boundaries and Wards**

**(1) Boundaries**

**Alteration of**  
**borough**  
**boundary**

**671** The boundary of the borough may be altered by a local Act or by an order of the Local Government Board Confirmation

of the earlier statute on these rights see *Hopkins v Swansea Corporation* (1 M. & W 621 644 affirmed (1841) 8 M. & W 901 Ex. Ch. As to exemption from tolls see title **HIGHWAYS STREETS AND BRIDGES** Vol. XVI p 60

(e) *Ex* see *R v Marshal* (187) 2 Term Rep 2 *R v Lowell* (1800) 8 Term Rep 639 *Helleston Case* (1776) 2 Doug El Cas 3 *Derby (Borough) Case* (1776) 3 Doug El Cas 287

(f) See *Lincoln Corporation v Holmes Common* (1861) L R 2 Q B 482

(g) See Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) s 2 and see title **CHARITIES** Vol IV p 226 note (o)

(h) 5 & 6 Will 4 c 76

(i) Municipal Corporations Act 1862 (45 & 46 Vict c 50) ss 201 202 As to the preservation of the rights of freemen in dissolved corporations see Municipal Corporations Act 1883 (46 & 47 Vict c 18) s 10 As to honorary freedom of the borough see the text *infra*

(k) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 204, see *R v Inman* (1820) 4 B & Ald 55 *R v Rowe* (1869) 4 Burr 2281 *R v Doncaster Corporation* (1848) 7 B & C 630 and title **ELECTIONS** Vol XII, p 179 An unqualified person is removed by *quo warranto* see e.g. *Re Armstrong* (1856) 2 Jur (N.S.) 211, *R (Roycroft) v County Cork Justices* (1910), 44 I L T. 120 As to this proceeding, see title **CROWN PRACTICE** Vol X pp 128 *et seq*

(l) Honorary Freedom of Boroughs Act 1885 (48 & 49 Vict c 29) s. 1 As to freemen of the London livery companies, see title **COMPANIES**, Vol. V, pp 748—751

## PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

by Parliament of an order is necessary (*m*) The measure effecting the alteration may increase or decrease the number of wards, alter the boundaries of the wards, and the apportionment of councillors amongst them It may also alter the total number of councillors and, in this instance make a proportionate alteration in the number of aldermen (*n*) Care must be taken to prevent intersection of the boundaries of areas of local government (*o*)

SECT 5  
The  
Borough

Boroughs may be united by the same procedure by which county boundaries may be altered, and confirmation by Parliament is necessary (*p*)

Union of  
boroughs

Any areas of local government within the borough may be altered by the same procedure by which county boundaries may be altered, but without confirmation by Parliament (*q*)

Alteration of  
areas within  
borough

### (11) Wards

**672** The division of the borough into wards the alteration in the number of wards, or the alteration of their boundaries is effected by an Order in Council upon the petition of a majority of the council to the King (*r*) The petition may pray for an alteration of boundaries without an alteration in the number of wards (*s*)

Division and  
alteration  
of wards

Notice of the petition and of the time when the Privy Council will take it into consideration is published in the *London Gazette* a month before the petition is considered (*a*)

When the Order in Council is made the Secretary of State appoints a commissioner to prepare a scheme for determining the boundaries of the wards and apportioning the councillors among them (*b*)

A further petition for the above purposes may not be presented by the council before the expiration of seven years from the date of the previous Order in Council (*c*)

### SUB SECT 15—Accounts

**673** The treasurer (*d*) is required to make half yearly accounts to such dates as the council, with the approval of the Local Government Board may appoint, and subject to such appointment, to the

Under  
Municipal  
Corporations  
Act

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 54 (1)—(3) The powers of the Board to alter local government areas conferred by the Public Health Act 1875 (38 & 39 Vict. c 55) s 20 are if not impliedly repealed superseded in practice by the provisions of the Local Government Act 1888 (51 & 52 Vict c 41)

(*n*) *Ibid* s 54 (4)

(*o*) *Ibid* s 60

(*p*) *Ibid* s 54 (1)—(3)

(*q*) *Ibid* s 54 (1) (2)

(*r*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 30 (1) as altered by the Municipal Corporations Act 1893 (56 & 57 Vict c 9) s 2

(*s*) *Ibid* s 2

(*a*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 30 (2)

(*b*) *Ibid* s 30 (3) For the proceedings of the commissioner his remuneration, the details of the scheme and payment of expenses see *ibid* s 30, Scheds. IV V

(*c*) Municipal Corporations Act 1893 (56 & 57 Vict. c 9) s 3

(*d*) As to his appointment see p 313 *ante* As to the duty of other officers to account, see Municipal Corporations Act, 1882 (45 & 46 Vict c 50) s 21.

## ~~Local Government~~

**Section A.**  
**The Borough**

**Inspection of accounts**

dates in use on the 31st December, 1882 (e) After the audit (f) of the accounts for the second half of the financial year the treasurer must print a full abstract of the year's accounts (g)

The accounts are open to the inspection of the council, at any reasonable time during the ordinary hours of business without payment and a member of the council may make a copy thereof or take an extract from them (h)

The abstract is open to inspection at the like hours and without payment by all the ratepayers of the borough (i), and copies of it must be delivered to any ratepayer on payment of a reasonable price for each copy (k)

**Returns**

The town clerk is required (l) to make within one month after the completion of the audit for the second half of the year a return to the Local Government Board of the receipts and expenditure of the corporation for each financial year (m)

**Under Public Health Acts**

**674** Accounts of receipts and expenditure of the borough council acting as an urban authority under the Public Health Acts (n) and of their committees and officers so acting, are to be made up half yearly to the 30th September and the 31st March and in such form as the Local Government Board prescribe (o)

### SUB SECT 16 — *Audit*

**The audit rs.**

**675** There are three borough auditors Two are elective and are corporate officers (p) and subject to the provisions relating to such officers They are elected by the burgesses or citizens (q) for a term of one year and each of them must during his term of office be qualified to be a councillor (r) but must not be a member of the council nor the town clerk, nor the treasurer (s) The third the mayor's auditor, must be a member of the council and is appointed by the mayor for one year on the ordinary day of election

**Elective auditors**

**Mayor's auditor**

(e) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 26

(f) See the text *infra*

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 27 (2)

(h) *Ibid* s 233 (3) (6) Obstruction to inspection or refusal to give such copies or extracts is punishable on summary conviction by a fine not exceeding £5 (*ibid* s 233 (7)) As to enforcement of orders of courts of summary jurisdiction see title MAGISTRATES p 604 *post*

(i) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 233 (4) (6)

(k) *Ibid* s 233 (4) As to obstructing inspection or refusing copies see note (h) *supra*

(l) Under a penalty not exceeding £20 recoverable by action on behalf of the Crown in the High Court (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 28 (5))

(m) *Ibid* s 28 An abstract of such returns is to be laid annually before Parliament by the Local Government Board (*ibid* s 28 (6))

(n) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION As to the accounts of the council as education authority see title EDUCATION Vol XII p 52

(o) Local Government Act 1894 (56 & 57 Vict c 73), s 58 (1) (2) This practically supersedes the Public Health Act 1875 (38 & 39 Vict c 55), s 24a

(p) See p 296 *ante*

(q) As to their election see title ELECTIONS Vol XII pp 355 356

(r) For the qualification of councillor see p 303 *ante*.

(s) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 25 (1), (2).

## PART I.—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

of the elective auditors Casual vacancies must be filled within ten days of their occurrence (*t*)

SECT. 4.  
The  
Borough.  
Remunera-  
tion

Elective auditors are not entitled to any remuneration for auditing the accounts of the borough treasurer (*a*), but, when auditing the accounts of the council as the sanitary authority they are entitled to reasonable remuneration, not being less than two guineas for every day in which they are so employed (*b*)

**676** Within one month from the date to which the treasurer (*c*) is required to make up his accounts (*d*) in each half year he must submit them with the necessary vouchers and papers to the borough auditors (*e*) who must audit them (*f*) The powers and duties of the auditors however are limited to checking the accounts examining into the legality of payments and reporting illegal or improper payments to the council and burgesses There is no machinery for compelling the due performance of these powers, nor have the auditors power to surcharge the members of the council (*g*) On the other hand, the audit is not conclusive, and does not prevent proceedings being brought on the information of a burgess to dispute the treasurer's accounts (*h*)

The audit

**677** Where there is a joint committee consisting of persons appointed by the borough council and by some other council not being that of a borough for purposes in which the two councils are jointly interested (*i*) the accounts of such committee are audited by a district auditor, subject to the usual regulations affecting such audit (*j*)

Audit of  
accounts of  
joint com-  
mittee

### SUB SECT. 17.—Legal Proceedings

**678** Legal proceedings (*k*) in matters connected with a borough

In general

(*t*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 25 (1) (*i*) (*5*) (*6*) As to the penalty for acting as auditor after ceasing to be qualified see *ibid* s 41 and p 296 *ante* As to the re eligibility of an elective auditor see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 37 and p 299 *ante* By virtue of a local Act or provisional order audit by an auditor of the Local Government Board is (1911) in force in the following boroughs—Bournemouth Chelmsford Cheltenham Merthyr Tydvil Plymouth Poole Southend Swindon and Tunbridge Wells

(*a*) *Thomas v Devonport Corporation* [1900] 1 Q B 16 C A

(*b*) Public Health Act 1875 (38 & 39 Vict c 55) s 246 The audit of the accounts of the council as sanitary authority (see p 311 *ante*) is conducted in the same way and at the same time as the audit of the treasurer's accounts

(*c*) See p 313 *ante*

(*d*) See p 323 *ante*

(*e*) As to the audit of the accounts of the council as education authority see title EDUCATION Vol XII p 52 compare the provisions as to audit of the accounts of the county council see p 363 *post*

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 27 (1)

(*g*) See *A G v De Winton* [1906] 2 Ch 106, *Thomas v Devonport Corporation supra*

(*h*) *A G v De Winton supra*

(*i*) Under the Local Government Act 1894 (56 & 57 Vict c 73), s 57, and see p 280 *ante*

(*j*) Local Government Act 1894 (56 & 57 Vict c 73), s 58 (2) and as to audits by district auditors see p 284, *ante*

(*k*) As to the publication of notices and other documents required to be fixed on the town hall, see note (*k*) p 308, *ante*



**Part 5  
The  
Borough**

**Under  
Municipal  
Corporations  
Act, 1882**

**Penal actions  
against  
officers**

are governed by the provisions of the statute under which they are taken (l)

**679** In the case of offences punishable and fines recoverable summarily under the Municipal Corporations Act, 1882 (m), the information must be laid within six calendar months after the commission of the offence (n), and an appeal lies to the quarter sessions from a conviction by a court of summary jurisdiction on the part of the person aggrieved (n)

Fines not recoverable summarily may be recovered by action in the High Court (o) as in the case of proceedings to recover penalties from a corporate officer (p)

No convictions orders, warrants nor other matters done, or purporting to be done, may be quashed for want of form nor be removed by *certiorari* or otherwise into the High Court, unless it is an order of the council for the payment of money out of the borough fund (q) or is an order made without jurisdiction (r)

**680** A penal action which lies against a corporate officer for acting in the office illegally (s) must be brought by a burgess of the borough and it is a condition precedent to the action that the plaintiff should serve personally on the officer within fourteen days after the cause of action arises a notice in writing of his intention to bring the action and that the action be commenced within three months after the cause of action arises (t) The defendant is entitled to security for costs from the plaintiff upon application made within fourteen

(l) *I g* when the borough council is proceeding as sanitary authority under the Public Health Acts (see p 311 *ante* and title PUBLIC HEALTH AND LOCAL ADMINISTRATION) the provisions of those statutes are applicable see p 289 *ante* The Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 219—227 with the exception of *ibid* s 221 relating to the application of penalties in quarter sessions boroughs are applied to county councils (Local Government Act 1888 (51 & 52 Vict c 41) s 76) As to proceedings by and against corporations generally see title CORPORATIONS Vol VIII pp 392 *et seq*

(m) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 219 (1), Interpretation Act 1889 (52 & 53 Vict c 63) s 3 As to the application of penalties in quarter sessions boroughs see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 221 as to the duties of clerks of the peace as to fines and forfeitures see *ibid* s 222 and as to the service of summons or warrant see *ibid* s 223 and generally, title MAGISTRATES pp 531 *et seq post*

(n) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 219 (2) As to appeals to quarter sessions see titles CRIMINAL LAW AND PROCEDURE Vol IX p 267 MAGISTRATES pp 642 *et seq post*

(o) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 219 (3)

(p) Under *ibid* s 41 as to which see p 296 *ante*

(q) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 220 As to orders for payment out of the borough fund see *ibid* s 141 and p 320 *ante*

(r) See *R v Bradley* (1894) 63 L J (M C) 183 *Colonial Bank of Australasia v Willan* (1874) L R 5 P C 417 *Ex parte Bradlaugh* (1878), 3 Q B D 509 and see title CROWN PRACTICE Vol X pp 192 *et seq*

(s) See p 296, *ante* and compare note (g), p 264 *ante*

(t) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 224 (1) These provisions are not superseded by the Public Authorities Protection Act, 1893 (56 & 57 Vict c 61), *Humphries v Worwood* (1894) 64 L J (Q B) 437, and see title LIMITATION OF ACTIONS p 176 *ante*, PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

## PART I.—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

SECT 5  
The  
Borough  
—

days of the service of the writ (*u*), and if successful, is entitled to costs taxed as between solicitor and client (*a*)

Half the penalty, if recovered goes, after payment of the costs of action (*b*), to the plaintiff, and the other half to the borough fund (*c*)

If the ground of action is that the defendant was not qualified in respect of estate, the *onus* lies upon him to prove his qualification (*d*)

An application for an information in the nature of a *quo warranto* against a person claiming to hold a corporate office must be made within twelve months from the time when he became disqualified after election (*e*)

*Quo warranto*

The respondent may show cause in the first instance against the application and if sufficient cause be not shown the court, on proof of due service of the necessary notice and affidavits, may make the rule for the information absolute or may direct any issue of fact to be tried by a jury in the High Court (*f*)

Showing  
cause

**681** A mandamus to proceed to the election of a corporate officer may be applied for in the same manner as to notice and affidavits as in the case of proceedings by way of *quo warranto* (*g*)

Mandamus

**682** Persons proceeded against in consequence of having acted in pursuance of execution or intended execution of the Municipal Corporations Act 1882 (*h*) have the general statutory protection accorded to persons acting under other statutory powers (*i*)

Protection  
of persons  
acting under  
the Municipal  
Corporations  
Act 1882

The borough council may, unless otherwise directed by the court pay out of the borough fund or borough rate (*h*) all or any part of any sums payable by its officer, agent or servant as defendant in or in consequence of any action prosecution or proceeding whether in respect of costs charges, expenses damages fine or otherwise (*l*)

(*u*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 224 (2)  
(*a*) *Ibid* s 224 (3) As to the effect of this provision upon the general discretion of the court as to costs see titles PRACTICE AND PROCEDURE PUBLIC AUTHORITIES AND PUBLIC OFFICERS and see title SOLICITORS

(*b*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 224 (5)

(*c*) See p 319 *ante*

(*d*) *Ibid* s 224 (4)

(*e*) *Ibid*, s 225 (1)—(4) As to these proceedings see, further *R v County Cork Justices* (1910) 44 L L T 120 and title CROWN PRACTICE Vol X pp 137 *et seq*

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 224 (5)—(7)

(*g*) *Ibid* s 225 (2)—(6) (8) As to when a mandamus will lie and the proceedings thereon see title CROWN PRACTICE Vol X pp 80, 81 110 *et seq* and see *ibid*, p 115

(*h*) 45 & 46 Vict c 50

(*i*) See Public Authorities Protection Act 1893 (56 & 57 Vict c 61) superseding the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 226 (1) (2) This, however does not affect the express limitations of time for bringing proceedings under *ibid* s 75 in relation to burgess lists as to which see title ELECTIONS Vol XII p 539, and under the Municipal Corporations Act, 1882 (45 & 46 Vict c 50) s 224 as to which see p 326 *ante* As to such statutory protection see title LIMITATION OF ACTIONS p 116 *ante*, PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(*h*) As to the borough fund see p 319, *ante* and as to the borough rate, see p 320 *ante*

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 226 (3). As to a similar power in county councils see Local Government Act 1888 (51 & 52 Vict c 41), s 68,

## SECT 5

The  
BoroughPower to  
make bye  
lawsSUB SECT 18—*Bye laws*

**683** The council may make bye laws for the good rule and government of the borough and for the prevention and suppression of nuisances not already summarily punishable under any statute in force throughout the borough (*m*) as to fines for non acceptance of office (*n*) for the purposes of the Public Health Acts (*o*), and when specially empowered by statute (*p*)

SUB SECT 19—*Towns Improvement Clauses Act 1847*

## Description

**684** The Towns Improvement Clauses Act 1847 (*q*) embodies a number of provisions relating to the control and government of towns and is applicable to such towns and districts when and to the extent in which its provisions are made applicable by any Act in which it is in whole or in part incorporated (*q*) It is divided into groups of sections with a general heading of the matters to which they relate and may be in part incorporated with the special Act by a reference to any of such headings (*r*)

SUB SECT 20—*Municipal Corporations Act 1882*General  
description

**685** After the establishment of the 178 (*s*) municipal corporations in 1882 there still remained 74 smaller places which were or

(*m*) See Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 23 Fines up to £5 may be provided for (*ibid*) The meeting at which the bye laws are made must consist of at least two thirds of the whole number of the council (*ibid* s 23 (2)) Breaches of the bye laws may be prosecuted summarily (*ibid* s 23 (5)) As to summary proceedings generally see title MAGISTRATES pp 531 *et seq post* As to nuisances generally see title NUISANCE

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 34

(*o*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*p*) *E.g.* under the Public Libraries Act 1901 (1 Ldw 7 c 19) s 3 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) for the use of locomotives on roads (see Local Government Act 1888 (51 & 52 Vict c 41) s 3 (4) (*a*)) title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 117 118 231 256) with respect to the sale of coal (see Weights and Measures Act 1889 (52 & 53 Vict c 21) s 28 title WEIGHTS AND MEASURES) see also the general provisions relating to bye laws contained in the Towns Improvement Clauses Act 1847 (10 & 11 Vict c 34) As to evidence of bye laws see title EVIDENCE Vol XIII p 526 *Tinotly v Lenn* (1910) 10 L T 283 *Drew v Harlow* (1875) 39 J P 420 *Moises v Thornton* (1799) 8 Term Rep 303 307 Forging the seal or signature affixed or subscribed to a bye law or tendering in evidence any document as a copy of bye laws with a false or counterfeit seal or signature and knowing it to be false or counterfeit is a misdemeanour (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 23*a*) The liability is two years imprisonment with hard labour (*ibid*)

(*q*) 10 & 11 Vict c 34 s 1 The Act in which it is incorporated is called the special Act, and the term the commissioners is used to designate those persons including corporations entrusted by the special Act with the powers of executing it (*ibid* s 2) As to the incorporation of provisions of the Act in the Public Health Act 1875 (38 & 39 Vict c 55) s 160 see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 214 note (*i*) 236 note (*a*) 247 *et seq*

(*r*) Towns Improvement Clauses Act 1847 (10 & 11 Vict c 34) s 5 For the matters dealt with in the Act see also titles COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 171 FOOD AND DRUGS Vol XV, pp 40 *et seq* NUISANCE PUBLIC HEALTH AND LOCAL ADMINISTRATION RATES AND RATING, WATER SUPPLY

(*s*) There are now (1911) 320 municipal cities and boroughs under the Municipal Corporations Act, 1882 (45 & 46 Vict c 50)

were reputed to be possessed of corporations. These had been reported upon by the commissioners who sat in 1876, but having been omitted from the legislation of 1882, were dealt with in 1883 (*t*) either by the grant of charters to the places, by which they became municipal boroughs or by dissolving the corporations (*a*)

In the cases where the corporations were dissolved (*b*) all their property was applied for the public benefit of the inhabitants according to a scheme formulated by the Charity Commissioners or the Local Government Board and was vested in such person or body as the scheme directed (*c*)

Powers duties and trusts existing in respect of a dissolved corporation were vested in and were exercised performed, and administered by the persons nominated in the scheme (*d*)

### Sect 6—The Rural District (*c*)

#### SUB SECT 1—The Rural District Council

##### (1) Constitution

**686** The administrative body of a rural district is a body corporate consisting of a chairman and councillors (*f*), and is styled the rural district council of ———. If there be any doubt about the name it is to be such as the county council directs (*g*). The council has perpetual succession and a common seal, and may hold land for the purpose of its powers and duties without licence in mortmain (*h*)

Nature and  
name

(*t*) By the Municipal Corporations Act 1883 (46 & 47 Vict c 18)

(*a*) In 1883 there also existed a number of reputed or prescriptive boroughs which were not municipal corporations. As to some of these special provisions were made for preserving their former privileges but without granting to their corporations any municipal rights and powers. The places specially mentioned were Alnwick Altrincham Corfe Langhorne Malmesbury Newport (Pembroke) Over Romney Marsh Winchelsea as to which see Municipal Corporations Act 1883 (46 & 47 Vict c 18) ss 14–24. Alnwick also has a local Act (45 & 46 Vict c xxiii). Provision was made for enabling another place Havering atte Bower to be reunited with the county of Essex (Municipal Corporations Act 1883 (46 & 47 Vict c 18) s 18)

(*b*) Municipal Corporations Act 1883 (46 & 47 Vict c 18) s 3 (1) (*a*)

(*c*) *Ibid* ss 3 (1) (*b*) 4 (2). Provision was made for the vesting and management of the property pending a scheme (*void* s 3 (2)) whilst other provisions of a more or less protective and temporary character gave further powers to the Charity Commissioners (*ibid* s 8) and see title CHARITIES Vol IV p 180

(*d*) Municipal Corporations Act 1883 (46 & 47 Vict c 18) s 9 (3). All questions in dispute as to property powers duties and trusts were made determinable by the Charity Commissioners with an appeal to the High Court by any person claiming to be or being interested in the property under the Charitable Trusts Act 1860 (23 & 24 Vict c 136) s 8 (Municipal Corporations Act 1883 (46 & 47 Vict c 18) s 9 (4))

(*e*) The rural district is that area which was formerly known as the rural sanitary district (Local Government Act 1894 (56 & 57 Vict c 73) s 21 (2)) see the Public Health Act 1875 (38 & 39 Vict c 55) s 9. As to the power to alter such districts see p 377 *post*

(*f*) Local Government Act 1894 (56 & 57 Vict c 73) ss 21 (2) 24 (1)

(*g*) *Ibid* s 24 (1). A name may be changed in the same way as in the case of an urban district council see *ibid* s 55 (3)–(5) and note (*d*) p 262, *ante*.

(*h*) Local Government Act 1894 (56 & 57 Vict c 73), s 24 (7), and see title CHARITIES, p 137, note (*n*)

## SECT 6

The Rural  
District

## Chairman

**687** The chairman is elected by the councillors at their annual meeting for a term of one year during which he is entitled to take the chair at all meetings (i). He may be chosen from persons who are not councillors (k), and a woman may be elected chairman if she is one of the councillors (l). The chairman (if a male) is *ex officio* a justice of the peace for the county in which the district is situate, unless personally disqualified by statute (m). A person cannot be a chairman if he suffers any of the disabilities which have been stated as applicable to urban district councillors (n).

If the chairman dies resigns or becomes incapable of acting another member must be chosen to serve during the unexpired period of his chairmanship (o). If absent from any meeting the members present may elect a chairman for the meeting (p).

Vice chair  
man

**688** A vice chairman may be appointed by the council from among the councillors to hold office during the term of office of the chairman whose powers and authority he has during any absence or inability (q).

## Councillors

**689** The councillors are elected for the parishes or other areas of the district or for the wards if any of the parishes (r) as determined and fixed by the Local Government Board (s).

They are the representatives of the parish or area on the board of guardians and are to be deemed guardians and no other election of guardians is to be made for such parish or area (t).

Qualifications  
and dis-  
qualifications

The rules as to the qualification and disqualification of councillors are the same as for urban district councillors (a) with the addition that a person qualified to be a guardian of a union in the district may be elected and a person disqualified to be a guardian cannot sit (b).

Acceptance  
of office etc

The provisions as to acceptance of office resignation, casual vacancies (c) vacation by absence (d) re eligibility (e) tenure and

(i) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (1) applying the Public Health Act 1875 (38 & 39 Vict c 55) s 199 Sched I (3) and see title ELECTIONS Vol XII pp 382 375

(k) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (1)

(l) See note (k) p 262 ante

(m) Local Government Act 1894 (56 & 57 Vict c 73) s 22 He must take the requisite oath if he has not already done so (i) and see title MAGISTRATES p 539 post

(n) Local Government Act 1894 (56 & 57 Vict c 73) s 46 see p 264 ante

(o) *Ibid* s 59 (1) applying the Public Health Act 1875 (38 & 39 Vict c 55) s 199 Sched I (4)

(p) *Ibid*, Sched I (5)

(q) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (2)

(r) *Ibid* ss 20 (3) 24 (1) Any areas for which under a local or personal Act guardians are elected are deemed parishes for the purpose of the election of councillors (*ibid* s 60 (4)) As to poor law guardians see title POOR LAW

(s) *Ibid* s 60 (1) See p 318 post As to their election see generally title ELECTIONS Vol XII pp 316 et seq

(t) Local Government Act 1894 (56 & 57 Vict c 73) s 24 (3)

(a) See p 263, ante

(b) Local Government Act 1894 (56 & 57 Vict c 73) ss 24 (4) 46 (5).

(c) Rural District Councillors Election Order 1898 r 25 and Sched V The fine imposed by way of penalty for non-acceptance of office goes to the credit of the parish for which the person fined was elected For exempted persons see note (g) p 264, ante

(d) Local Government Act 1894 (56 & 57 Vict c 73), s 46 (6), see p 265, ante.

(e) *Ibid* s 46 (7), applying the Municipal Corporations Act, 1862 (25 & 26

retirement (*f*), are the same as in the case of urban councillors (*g*)

The number of councillors for each parish or other area in a rural district is to be the same as the number of guardians for the parish or area (*h*) but the county council (*i*) may from time to time fix or alter the number of councillors to be elected for each parish within the county, and for this purpose may exercise the powers of adding parishes to each other, and dividing parishes into wards similar to those which are vested in the Local Government Board for the purpose of the election of guardians (*k*)

ST-CT &  
The Rural  
District

Number of  
councillors

(11) *Powers Duties and Liabilities*

**690** The rural district council is the sanitary and highway authority of its area (*l*), and possesses the powers and duties already stated as having been transferred from the justices out of session and from the quarter sessions to urban district councils (*m*) and those under various statutes dealing with the interests of its district and the inhabitants (*n*) It may also have powers conferred upon it as the delegate or agent of the county council in matters affecting the rural area (*o*) It may exercise any of its powers in an adjoining district with the consent of the council of that district and treat the expenses thereof as incurred in its own district (*p*) and it may delegate certain of its powers to a parochial committee formed for a contributory place or to the parish council of that place (*q*)

Powers in  
general

If a rural parish is co extensive with a rural sanitary district the district council is deemed to be and to have the powers of a parish council, unless and until its district is united with some other district or the county council otherwise directs (*r*)

Vict c 50) s 37 as modified by the Rural District Councillors Election Order 1898 r 25 (1) and Sched V

(*f*) Local Government Act 1894 (56 & 57 Vict c 73) ss 20 (6) 24 (4) District Councillors and Guardians (Term of Office) Act 1900 (63 & 64 Vict c 16) s 1 (1) (2). County councils can regulate the retirement of councillors when they retire by thirds (see Local Government Act 1894 (56 & 57 Vict c 73) s 60 (2) (3) District Councillors and Guardians (Term of Office) Act 1900 (63 & 64 Vict c 16) s 1 (3))

(*g*) See pp 263 *et seq ante*

(*h*) Local Government Act 1894 (56 & 57 Vict c 73) s 24 (4)

(*i*) Or joint committee if the district is in more than one county (*ibid* s 60 (3))

(*k*) *Ibid* s 60 (1). The powers are those under the Acts for the relief of the poor see title POOR LAW As to the election of guardians see title ELECTIONS Vol XII pp 389 *et seq*

(*l*) Local Government Act 1894 (56 & 57 Vict c 73) ss 25 (1) 26 (1) see titles HIGHWAYS STREETS AND BRIDGES Vol XVI, p 25 PUBLIC HEALTH AND LOCAL ADMINISTRATION As to the power to assist in maintaining rights of commons see title COMMONS AND RIGHTS OF COMMON Vol IV pp 599 601

(*m*) See p 266 *ante* The provisions relating to transfer apply as to which see Local Government Act 1894 (56 & 57 Vict c 73) ss 61 68 70 and see note (*n*), p 266 *ante*

(*n*) See p 267 *ante*

(*o*) Local Government Act 1888 (51 & 52 Vict c 41) ss 28 (2) (3) 64

(*p*) Public Health Act 1875 (38 & 39 Vict c 55) s 280

(*q*) See the Local Government Act 1894 (56 & 57 Vict c 73) s 15 Public Health Act 1875 (38 & 39 Vict c 55) ss 202, 203 (Commons Act 1899 (62 & 63 Vict c 30) s 4

(*r*) Local Government Act 1894 (56 & 57 Vict c 73), s 36 (4)

**SECT 6**  
**The Rural**  
**District.**  
 —  
**Urban**  
**powers may**  
**be conferred**

**691** The Local Government Board may by general orders to be laid before Parliament direct that the councils shall have such powers duties and liabilities of urban authorities under the Public Health Acts (*s*) and any other Acts and that such provisions of any of those Acts relating to urban districts shall apply to rural districts, as the Board may think fit (*t*)

Further, the Board may by order (*u*) declare that any provisions of the Public Health Acts (*s*) in force in urban districts shall be in force in a rural district or contributory place, and may invest the council with all or any of the powers rights, duties, capacities, liabilities and obligations of an urban authority under the Public Health Acts (*s*) This power of the Board may be exercised on the application of the council or of persons rated to the relief of the poor the assessment of whose hereditaments amounts at least to one tenth of the net rateable value of such district or contributory place (*v*) or of a county council or with respect to a parish or a part of a parish, of the parish council (*a*)

**Where rural**  
**council**  
**ineffective**

**692** In the event of a rural council being unable to act, either from failure to elect or otherwise the county council may order elections to be held and may appoint persons to form the rural district council until an effective council is constituted (*b*)

**Contracts.**

**693** The council may enter into any contracts necessary for carrying the Public Health Acts (*c*) into execution (*d*) Such contracts are governed by the ordinary law relating to the contracts of corporate bodies (*e*) The statutory provisions which require contracts of £50 and more to be in a certain form (*f*) do not apply to contracts of a rural council

#### (iii) Officers

**The officers**

**694** The rural district council must appoint one or more medical officers of health (*g*) and one or more inspectors of nuisances and also such assistants and other officers and servants as may be

(*s*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*t*) Local Government Act 1894 (56 & 57 Vict c 73) s 25 (5) This power is additional to that under the Public Health Act 1875 (38 & 39 Vict c 55) (see the text *infra*) (Local Government Act 1894 (56 & 57 Vict c 73) s 25 (6))

(*u*) The order is to be published in the *London Gazette* or in such other manner as the Board directs (Public Health Act 1875 (38 & 39 Vict c 55) s 276)

(*v*) Public Health Act 1875 (38 & 39 Vict c 55) s 276 The investment may be made unconditionally or subject to specified conditions as to the time portion of the district or manner of the exercise or attachment of the powers etc But if the investment is made on the application of the ratepayers of a contributory place the order of the Board cannot invest the council with any new powers beyond the limits of the contributory place (*ibid*)

(*a*) Local Government Act 1894 (56 & 57 Vict c 73) s 25 (7)

(*b*) *Ibid* s 59 (5)

(*c*) See generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*d*) Public Health Act 1875 (38 & 39 Vict c 55) s 113

(*e*) See title CORPORATIONS Vol VIII pp 379 *et seq*

(*f*) See p 268 *ante*.

(*g*) Districts may be united for the purpose of appointing such officers; see p 438, *post*.

necessary and proper for the execution of its powers and duties (*h*)

The council may utilise the services of the clerk and treasurer of the guardians, and, for such additional duties may remunerate them as it may think proper but subject to the approval of the Local Government Board. If the clerk of the union will not or cannot undertake the duties, the assistant clerk may be appointed (*i*)

#### SECT 6 The Rural District

Clerk and treasurer may be clerk and treasurer of guardians

**695** When the powers and duties of any authority other than justices, are transferred by virtue of the Local Government Act 1894 (*k*), to any district council the officers of that authority become the officers of the council on the same terms and tenure as before and, so long as they perform the same duties at a salary not less than formerly. For this purpose the body appointing a surveyor of highways is deemed to be a highway authority and any paid surveyor to be an officer of that body (*l*) and where by the Act a rural sanitary district is divided, any officer for the divided district holds office for each division and his salary is borne by the respective districts in proportion to their rateable value at the commencement of the next local financial year (*m*)

Officers of authority the powers of which have been transferred

**696** Existing officers affected by changes are entitled to receive compensation for loss thereby sustained, payable as general expenses of the council (*n*)

Compensation

**697** The provisions as to concern or interest in bargains or contracts with the council which apply to the officers of urban district councils are equally applicable to those of rural district councils (*o*)

Disabilities

(17) *Medical Officer of Health and Inspector of Nuisances.*

**698** The provisions already stated as regulating the appointment of medical officers of health and inspectors of nuisances by urban district councils apply equally to their appointment by rural district councils (*p*), except that on the appointment of a medical officer of health when a portion of the salary is to be paid out of a county grant, there is a slight difference in the provisions relating to the notice of appointment (*q*)

Appointment

(*h*) Public Health Act 1875 (38 & 39 Vict c 55) s 190

(*i*) *Ibid*

(*k*) 56 & 57 Vict c 73

(*l*) *Ibid* s 81 (1) (*4*) and see title HIGHWAYS, STREETS, AND BRIDGES Vol XVI pp 25 note (*b*) 124. For the meaning of existing and officer see Local Government Act 1883 (51 & 52 Vict c 41) s 100 applied by the Local Government Act 1894 (56 & 57 Vict c 73) s 75. As to assistant overseers see title POOR LAW

(*m*) Local Government Act 1894 (56 & 57 Vict c 73) s 81 (*v*)

(*n*) *Ibid*, s 81 (7) see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(*o*) See p 274 *ante*

(*p*) See pp 275 277 *ante*. The General Order applicable is that of 23rd March 1891 which with the difference mentioned in the text is practically identical with the order of even date relating to urban district councils (see note (*a*), p 276, *ante*). Other orders relating to medical officers of health in rural districts are dated 11th November 1872 11th and 13th March 1880 (applicable where part of the salary was payable out of moneys voted by Parliament) and 12th March, 1880 (applicable where no such payments were to be made)

(*q*) General Order, 1891 (Rural Districts), art. 3



## SUB SECT 2

## (v) Alteration of Areas

## The Rural District

By Local Government Board and county councils

**699** The Local Government Board was empowered by the Public Health Act 1875 (r), to alter local government areas generally (s), and by provisional order to constitute any rural district or part thereof as a local government district either on its own initiative (t) or in pursuance of a resolution of owners and ratepayers (a) but this power has not been exercised since the Local Government Act 1888 (b), conferred wide powers for the same purpose on county councils c), and the latter provisions have in practice superseded, if they have not impliedly repealed the earlier provisions

Special drainage districts

**700** A rural district council may, by resolution approved by the Local Government Board, constitute a portion of its area as a special drainage district for the purpose of charging thereon exclusively the expenses of sewerage water supply, or of other works, which by the Public Health Acts (d) are or by order of the Board may be, declared to be special expenses. Such area thereupon becomes a separate contributory place (e)

Contributory place

## SUB SECT 2—Proceedings of Council and Committees

## (1) Meetings

Meetings

**701** The meetings and proceedings of the rural district council including committees are regulated in the same way as those of urban district councils other than boroughs (f)

The council is entitled to use, for the purpose of its meetings and proceedings the board room and offices of any board of guardians for the union comprising its district at all reasonable hours and the reasonableness of hours is a question to be determined by the Local Government Board in case of difference (g)

## (11) Inspection of Documents

Inspection of documents

**702** Every parochial elector of a parish in a rural district may at all reasonable times without payment inspect and take copies of and extracts from, all books accounts and documents belonging to or under the control of, the district council of the district (h)

(r) 38 & 39 Vict c 55

(s) *Ibid.* ss 270 270

(t) *Ibid.* s 271

(a) *Ibid.* s 272

(b) 51 & 52 Vict. c 41

(c) *Ibid.* s 57 and see p 317 post

(d) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(e) Public Health Act 1810 (38 & 39 Vict c 55) s 277 and as to contributory places see p 335 post see also titles SEWERS AND DRAINS WATER SUPPLY

(f) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (1) and see pp 218 et seq ante Inspectors of the Local Government Board may attend (Public Health Act, 1875 (38 & 39 Vict 55) s 205)

(g) Local Government Act 1894 (56 & 57 Vict c 73) s 59 (3)

(h) *Ibid.* s 58 (5) R v Bradford on Aton District Council Ex parte Thornton [1908] 1 T P 348 R v Gt. Smeeth Rural Council [1911] 2 K B 465, R v Wimbledon Urban District Council Ex parte Hutton (1897) 77 L T 599,

# PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

## (iii) Finance

### (a) Expenses

## SECT. 6. The Rural District

### Kinds of expenses.

**703** The expenses incurred by a rural district council are either general expenses, special expenses, private improvement expenses or those which by the statute under which they are incurred, are expressly made payable by the owners or occupiers in respect of whose property the expenses are incurred and in such cases they are recoverable in the special manner prescribed by the statute (i)

**704** General expenses are those which are not directly chargeable on owners and occupiers (k) but are the expenses of the establishment and officers of the council including compensation payable to existing officers (l), those in respect of disinfection and of the conveyance of infected persons (m), highway expenses (n) and all such other expenses as are not made special expenses by statute or by order of the Local Government Board (o)

General expenses are paid out of a common fund raised out of the poor rate of the parishes according to the rateable value of each contributory place (p)

**705** Special expenses are those which are determined by statute to be such and the expenses of the construction maintenance and cleansing of sewers in a contributory place the expenses of providing and maintaining a water supply in a contributory place so far as they are not defrayed out of water rates or rents under the Public Health Acts (q) the expenses and charges arising from and incidental to the possession of property transferred to the rural authority in trust for any contributory place all other expenses in or in respect of any contributory place in the council's district which are determined by order of the Local Government Board to be special expenses (r) These expenses are a separate charge on each contributory place (s)

**706** Contributory places consist of every parish not having any part of its area within a special drainage district or an urban district every special drainage district where a parish is wholly in a rural district and partly within a special drainage district, such part of it as is not within a special drainage district, where a

(i) Public Health Act 1875 (38 & 39 Vict c 55) s. 229 The provisions of the Act relating to expenses are made applicable to rural district councils (Local Government Act 1894 (56 & 57 Vict c 73) ss. 29)

(k) See for example the Public Health Act 1875 (38 & 39 Vict c 45) ss 23 98 and title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(l) Local Government Act 1894 (56 & 57 Vict c 73) s 81 (i) see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(m) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(n) Local Government Act 1894 (56 & 57 Vict c 73) s 29 and see, further title HIGHWAYS STREETS, AND BRIDGES, Vol. XVI p 126

(o) Public Health Act 1875 (38 & 39 Vict c 55) s. 229

(p) *Ibid*

(q) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(r) Public Health Act 1875 (38 & 39 Vict c. 55). As to contributory places, see p. 324, ante, and the text *infra*.

(s) *Ibid*.

**SECT 6**  
**The Rural**  
**District.**

Special  
expenses may  
be raised as  
general  
expenses

parish is partly within an urban district, such part of it as is not within the urban district or within a special drainage district (t)

**707** Expenses under the Local Government Act, 1894 (u), determined by the Board to be special expenses and a separate charge on a contributory place which would if not so separately charged be raised as general expenses, may by direction of the Board be raised in the same way as general expenses (v)

Apportion  
ment

**708** The expenses of sewers, water supply, or any other work for the common benefit of any two or more contributory places may be apportioned between the places by the council in such proportions as the council thinks just, and the apportionment to each place is deemed to be the special expenses incurred in respect of each place. An appeal lies from the apportionment to the Local Government Board whose decision by order is final (u)

Payment by  
contributory  
places

**709** The council obtains payment from the contributory places in its district by issuing its precept to the overseers of each such place. Separate precepts should be issued in respect of general and special expenses or if one precept be issued including both kinds of expenses the council must make general and special expenses separate items (a)

Private  
improvement  
expenses

**710** Certain expenses incurred by the council are declared by statute to be, or to be deemed to be, private improvement expenses whilst others may be declared to be such by the council under statutory sanction. Of the former is the proportion of increased value owing to the demolition of obstructive buildings under the Housing of the Working Classes Act, 1890 (b). Of the latter are those incurred in enforcing the drainage of undrained houses and making new sewers for the purpose (c), in requiring proper provision of sanitary conveniences (d), in remedying nuisances in drains and private sanitary conveniences (e) in providing a proper water supply to houses in certain cases (f), in compelling the

(t) Public Health Act 1875 (38 & 39 Vict c 55) s 229 As to special drainage districts see title SEWERS AND DRAINS

(u) 56 & 57 Vict c 73

(v) *Ibid* s 29

(w) Public Health Act 1875 (38 & 39 Vict c 55) s 229 The appeal must be made within twenty one days of the apportionment, by way of memorial stating the grounds of complaint (*ibid*)

(a) Public Health Act 1875 (38 & 39 Vict c 55) s 230 which also deals with cases in which a contributory place or a parish is part of a parish or contributory place and with the application of surplus left in the hands of overseers. See *ibid* s 231 as to enforcing payment and see *R v Fox Lea parte Hympson St Mary Rural District Council* (1908) 72 J P 331

(b) 53 & 54 Vict. c. 70, s 38 (8), see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(c) Public Health Act 1875 (38 & 39 Vict c 55) s 23, see title SEWERS AND DRAINS

(d) *Ibid* s 36 see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(e) Public Health Act 1875 (38 & 39 Vict c 55) s 41, see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION, SEWERS AND DRAINS

(f) Public Health Act 1875 (38 & 39 Vict. c 55) s 62 Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3, see title WATER SUPPLY.

sewerage etc of private streets when the council has for this purpose the powers of an urban district council (*g*)

**SECT 64  
The Rural  
District.**

These expenses are paid by making and levying a private improvement rate in the same way and subject to the same statutory provisions as an urban district council may make and levy such rate (*h*)

**Private  
improvement  
rate**

**711** The rural district council has the same power as is possessed by urban councils of paying as general expenses the cost of attendance at meetings of similar bodies for the purpose of discussing matters of public health and local government (*i*) and a similar order of the Local Government Board regulates the matter (*j*)

**Expenses of  
attending  
conferences**

**(b) Borrowing Powers**

**712** The council has the like powers of borrowing under the Public Health Act 1875 (*k*) as are specified as being competent to an urban district council and subject to the like terms and regulations (*l*)

**Under Public  
Health Act.**

The loans are raised on the credit of the common fund out of which general expenses are payable or on the credit of any rate or rates out of which special expenses are payable according as the loan is required for general or special expenses. Payment of the principal and interest may be secured by a mortgage of such fund or rates, as the case may be (*m*)

**(c) Accounts**

**713** The accounts of the council and of its committees and officers are to be made up half yearly to the 31st March and the 30th September in such form as the Local Government Board prescribes (*n*)

**How kept and  
made up**

The books and accounts to be kept under the general order of the Local Government Board (*o*), are the same as in the case of urban councils (*p*). The provision as to the annual report to be made to the Local Government Board by urban councils also applies, except as to the newspaper advertisement (*q*)

**(d) Audit**

**714** The accounts are audited by a district auditor, and the audit must be half yearly. Subject to this and to the right of the Local

**How made**

(*g*) Public Health Act 1875 (38 & 39 Vict c 55) s 150

(*h*) *Id* s 232

(*i*) Public Health and Local Government Conferences Act 1885 (48 & 49 Vict c 22) s 3

(*j*) General Order 28th December 1896. Its terms are practically identical with the Order of 13th May 1891 applicable to urban councils see note (*o*), p 282 *ante*

(*k*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*l*) See p 282 *ante*

(*m*) Public Health Act 1875 (38 & 39 Vict c 55), s 233 see note (*a*) p 282 *ante*

(*n*) Local Government Act 1894 (56 & 57 Vict c 33) s 58 (1) (2). As to the right of inspection see p 285 *ante*

(*o*) General Order 22nd March 1880

(*p*) See p 283 *ante*

(*q*) Public Health Act, 1875 (38 & 39 Vict. c 55), s 206, and see p. 283, *ante*.

**SECT 6**  
**The Rural**  
**District**

Government Board to make rules modifying enactments as to publication of notice of the audit and of the abstract of accounts and the report of the auditor, the enactments relating to audit by district auditors of accounts of urban sanitary authorities and their officers, and to all matters incidental thereto and consequential thereon, apply (r)

**SUB SECT 3 — Union of Districts**

**Under Public**  
**Health Acts**

**715** Rural district councils may apply to the Local Government Board to unite districts or contributory places for certain purposes of the Public Health Acts (s) and also for the purpose of appointing medical officers of health (t)

Two or more councils may combine for common purposes likely to be beneficial to them (u)

**SUB SECT 4 — Enforcement of Duties**

**Under Public**  
**Health Acts**

**716** The proceedings for compelling urban district councils to perform their duties under the Public Health Acts (v) are available also in the case of defaulting rural district councils (a), or upon a complaint made by a parish council of failure on the part of the rural district council in any of the above matters (b) and in maintaining and repairing highways the county council may exercise powers similar to those of the Local Government Board (c) and appoint someone to perform the duties (d)

**Under other**  
**statutes**

**717** Special provisions are also made to deal with the default of the council in matters relating to allotments (e) factories and work shops (f), housing of the working classes (g), nuisances (h), rights of way (i), repair of highways (l) and removal of house refuse (l)

(r) Local Government Act 1894 (56 & 57 Vict c 73) s 58 (2) (3) As to the audit of accounts of an urban sanitary authority under such enactments see p 284 ante As to district auditors see p 284 ante As to the report of the auditor and the publication of the financial abstract and other information relating thereto see Order of the Local Government Board as to Audit of Accounts of Rural District Councils Parish Councils and Joint Committees 20th May 1890

(s) Public Health Act 1875 (38 & 39 Vict c 55) s 249 As to the Public Health Acts generally see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(t) Public Health Act 1875 (38 & 39 Vict c 55) s 286 and see p 291 ante

(u) Public Health Act 1875 (38 & 39 Vict c 55) s 285 and see p 291 ante

(v) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(a) See p 315 post

(b) See p 249 ante

(c) *I.e.* under the Public Health Act 1875 (38 & 39 Vict c 55) s 299

(d) Local Government Act 1894 (56 & 57 Vict c 73) s 16 (1) (2) and see p 375 post

(e) See title ALLOTMENTS Vol I p 351

(f) See title FACTORIES AND SHOPS Vol XIV p 455

(g) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(h) Public Health Act, 1875 (38 & 39 Vict c 55) s 106 and see title

**NUISANCE**

(i) See title HIGHWAYS STREETS AND BRIDGES Vol XVI, p 163

(k) *Ibid* p. 128

(l) Public Health Act, 1875 (38 & 39 Vict c 55) s 43 and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

SECT 7 —*Joint Board for United Districts*

SECT 7 :  
**Joint  
Board  
for United  
Districts.**

**718** On the application of the councils of urban or rural districts the Local Government Board may by provisional order (*m*) direct rural districts or parts to be formed into a united district for all or any of the following purposes —(1) the procuring of a common supply of water, (ii) the making of a main sewer or the carrying into effect of a system of sewerage for the use of all such districts or contributory places (iii) any other purposes of the Public Health Acts (*n*), including joint boards as port sanitary authorities (*o*)

Formation  
of united  
district

The costs, charges and expenses of and incidental to the formation of the united district are a first charge on the rates leviable in the district (*p*)

Expenses

**719** The united district is governed by a joint board consisting of such *ex officio* members and of such number of elective members as the provisional order determines. The board is a body corporate by a name determined by the provisional order having perpetual succession and a common seal and it may hold lands for the purposes of its constitution without licence in mortmain (*q*)

Governing  
body

**720** Upon the joint board being so constituted the local authorities having jurisdiction in the component district or contributory places cease to exercise therein any powers or to perform any duties or to be subject to any liabilities or obligations which come within the province of the joint board but the latter may delegate to such authorities the exercise of any of its powers or the performance of any of its duties (*r*)

Effect of  
constitution

**721.** Statutory provisions regulate the meetings and proceedings of the joint board (*s*), expenses (*t*) payment of contributions (*a*), the enforcement of such payment (*b*) borrowing (*c*) and the protection of the board and its officers from personal liability (*d*)

Miscellaneous

(*m*) For the contents of the order see the Public Health Act 1875 (38 & 39 Vict c 55) s 281

(*n*) Public Health Act 1875 (38 & 39 Vict c 55) s 279. Joint boards existing in 1875 were preserved (*ibid* s 326). As to provisional orders see titles PARLIAMENT PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to sewerage see title SEWERS AND DRAINS. As to water supply see title WATER SUPPLY.

(*o*) Public Health Act 1875 (38 & 39 Vict c 55) s 287 and see p 292 *ante*. As to the power of the Board to create united districts in the case of main sewerage districts existing before 1875 see the Public Health Act 1875 (38 & 39 Vict c 55) s 323.

(*p*) *Ibid* s 279

(*q*) Public Health Act 1875 (38 & 39 Vict. c. 55) s 280 and see title CHARITIES, Vol IV p 137

(*r*) Public Health Act 1875 (38 & 39 Vict c 55) s 281

(*s*) *Ibid* s 282 Sched I

(*t*) *Ibid* s 283 and see *Darenth Main Valley Sewerage Board v Dartford Union Guardians* (1887) 19 Q. B. D. 270

(*a*) Public Health Act, 1875 (38 & 39 Vict c 55) s 284

(*b*) *Ibid* s 292

(*c*) *Ibid* s 244

(*d*) *Ibid* s 285

## SECT 8

The  
CountyMeaning of  
'county'SECT 8—*The County*SUB SECT 1—*In General.*

**722** The term county is here used as meaning the "administrative county, or that area mapped out for local government, for which a county council is elected for administrative and financial purposes. When so used it does not include a county borough, unless expressly mentioned (e)

The area of the administrative county is in many instances continuous with the geographical county or shire but some of the larger counties or shires have been divided into two or more areas, each of which is an administrative county of itself (f)

SUB SECT 2.—*The County Council*(1) *In General*Incorporation  
and its effects

**723** The county council is a body corporate by the name of the county council with the addition of the name of its administrative county (g). It has perpetual succession and a common seal and may acquire and hold land for the purposes of its constitution without licence in mortmain (h)

(2) *Constitution*

Description.

**724** The county council consists of a chairman aldermen and councillors, and as regards constitution election tenure of office conduct of proceedings, officers and members, is subject to the law already stated as respects a borough divided into wards (i), with the exceptions and modifications now to be mentioned

Distinguishing  
characteristics

A person elected as a member is not liable to pay a fine on non acceptance of the office when his consent to nomination was not previously obtained (k) an election of a county councillor to

(e) Local Government Act 1888 (51 & 52 Vict c 41) s 100

(f) For the administrative county of London see titles ELECTIONS Vol XII pp 393 397 METROPOLIS. As to county boundaries and their alteration see Local Government Act 1888 (51 & 52 Vict c 41) ss 50—63 as to electoral divisions of counties see *ibid* ss 2 51 75 100 title ELECTIONS Vol XII pp 194 note (f) 356 *et seq*. As to county court districts see title COUNTY COURTS Vol VIII pp 411 *et seq*.

(g) The incorporation does not extend the liabilities of the council so that liabilities arising from a transfer of property etc from the justices to the council are subject to the same restrictions as attached in the hands of the justices see Local Government Act 1888 (51 & 52 Vict c 41) s 64 and *Salford Corporation v Lancashire County Council* (1890) 25 Q B D 384 C A. The county council succeeded to all the duties and liabilities which were formerly imposed on the inhabitants of the county and wherever any enactment requires or authorises land to be conveyed or granted to or any contract or agreement to be made in the name of the clerk of the peace or the justices or others on behalf of the county or quarter sessions the conveyance grant contract or agreement is now made to or with the council itself (Local Government Act 1888 (51 & 52 Vict c 41) s 79 (2) (3)).

(h) *Ibid* s 79 (1) and see title CHARITIES Vol IV p 137

(i) Local Government Act 1888 (51 & 52 Vict c 41) ss 1 2 (1) and s 75 which applies with modifications the provisions of the Municipal Corporations Act 1862 (40 & 43 Vict c 50) relating to these subjects and see pp 302 *et seq* ante

(k) Local Government Act 1888 (51 & 52 Vict c 41) s 75 (16) (c). The provisions relating to the application of fines penalties and forfeitures recoverable in a summary manner are also not applicable (*ibid* s 75 (16) (a)).

## PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

fill a casual vacancy need not be held when the vacancy occurs within six months before the ordinary day of retirement of county councillors (*l*) the declaration on acceptance of office may be made at any time within three months after notice of the election and may be made before any justice of the peace or commissioner for oaths (*m*)

SECT 8  
The  
County

### (iii) Councillors

**725** The councillors are called county councillors (*n*) Their number is determined from time to time by the Local Government Board, as well as their apportionment between each of the non county boroughs in the county having sufficient population to return one councillor and the rest of the county (*o*)

Election and  
number

The qualifications and disqualifications of a county councillor are the same as those of a borough councillor (*p*) with certain modifications (*q*)

Qualifications  
and disqualifi-  
cations

### (iv) Aldermen

**726** The aldermen are called county aldermen (*a*) Their term of office qualification, and disqualification are the same as those of borough aldermen including the extension of the privilege to women (*b*) subject to the modifications above referred to in the case of county councillors (*c*) They are elected at the first quarterly meeting after the election of the new council (*d*)

Term of  
office etc

### (v) Chairman

**727** The head of the council is styled the chairman (*e*) He is elected at the first quarterly meeting (*f*) to serve for a year, or until

Appointment  
position and  
privileges

(*l*) County Councils (Elections) Act 1891 (54 & 55 Vict c 68) s 1 (4)

(*r*) *Ibid* s 5 As to the exemption from compulsory service see p 297 *ante*

(*n*) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (2) (c) As to the date and period of service mode of election and the persons entitled to vote see title ELECTIONS Vol XII pp 356 *et seq* and Local Government Act 1888 (51 & 52 Vict c 41) ss 2 (2) (d) 104 (1) The date of their retirement is 8th March when the new council comes into office (County Councils (Election) Act 1891 (54 & 55 Vict c 68) s 1 (2))

(*o*) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (3) (a) As to the power of altering the number of county councillors and electoral divisions in a county see p 314 *post*

(*p*) Local Government Act 1888 (51 & 52 Vict c 41) ss 2 (1) 15 see p 302 *ante*

(*q*) For these see Local Government Act 1888 (51 & 52 Vict c 41) ss 2 (2)

(*a*) (*b*) s 75 (12) (14) County Councils (Elections) Act 1891 (54 & 55 Vict c 68) s 6 Highways and Bridges Act 1891 (54 & 55 Vict c 63) s 5

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (2) (c)

(*b*) Qualification of Women (County and Borough Councils) Act 1901 (7 Edw 7 c 33)

(*c*) Local Government Act 1888 (51 & 52 Vict c 41) ss 2 (1) 7, see note (*q*) *supra* As to their election see title ELECTIONS Vol XII p 361 The first half of the county aldermen retired in March 1892 (Local Government Act 1888 (51 & 52 Vict c 41) s 104 (2)) and the second half in March 1895 (*ibid* s 104 (3))

(*d*) See p 314 *post*

(*e*) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (1) (a).

(*f*) See p 347 *post*



**SECT 3**  
**The**  
**County**

his successor shall have been duly installed, and is chosen from among the county aldermen, including the outgoing aldermen, or county councillors or persons qualified to be such (*g*)

He possesses no social precedence in the area of his jurisdiction (*h*), but if a man, by virtue of his office is a justice of the peace (*i*)

He has power to convene meetings of the council, and, when present is the chairman thereof with a second or casting vote (*k*), and he has also a casting vote at the election of an alderman (*l*)

(vi) *Vice Chairman*

**Vice**  
**chairman**

**728** The council may appoint a member to be a vice chairman (*m*)

**SUB SECT 3—Officers**

(1) *In General*

**Officers of the**  
**council**

**729** The chief officers of the county are the clerk of the peace and of the county council and his deputy the treasurer, the surveyor the medical officer of health (*n*) and the coroner (*o*) other officers may and in some cases must be appointed under special statutes (*p*) and beyond these the council may appoint such officers as may be necessary or discontinue such as are no longer required (*q*)

**Remunera**  
**tion etc**

**730** The remuneration of all officers appointed by the county council is determined by the council and such officers are under the same obligations as to giving security and as to accounting for all matters committed to their charge as are officers appointed by a borough council (*r*)

(*g*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 15 (1)—(*j*) applied by Local Government Act 1888 (51 & 52 Vict c 41) s 75

(*h*) Local Government Act 1888 (51 & 52 Vict c 41) s 75 (16) (*b*) expressly excluding the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 15 (5) compare as to mayors p 309 *ante* and further as to the chairman see title ELECTIONS Vol XII pp 359—361

(*i*) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (5) (*b*) Qualification of Women (County and Borough Councils) Act 1907 (7 Edw 7 c 33) s 1 As to the oaths required of justices, see title MAGISTRATES p 539 *post*

(*k*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) Sched II (3) (*g*) and (11) applied by the Local Government Act 1888 (51 & 52 Vict c 41) s 75 see further as to proceedings p 347 *post*

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 60 (*b*) as amended by the Municipal Corporations Act 1910 (10 Edw 7 & 1 Geo 5 c 19) s 1 (2) applied by the Local Government Act 1888 (51 & 52 Vict c 41) s 75

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (6) see further title ELECTIONS Vol XII p 360 and see especially *ibid* note (*c*)

(*n*) See pp 343—344 *post*

(*o*) See title CORONERS Vol VIII p 212

(*p*) See p 347, *post*

(*q*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 19 applied by the Local Government Act 1888 (51 & 52 Vict c 41) s 75 For the position of officers transferred to the county council in 1888 see *ibid* ss 118 119 120 and for compensation for loss of office see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS All persons serving under the council are agents within the meaning of the Prevention of Corruption Act 1906 (6 Edw 7 c 34) s 1 (3) and see title CRIMINAL LAW AND PROCEDURE Vol IX p 710

(*r*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 20, 21, applied by the Local Government Act 1888 (51 & 52 Vict c 41) s 75 As to the remuneration of, clerks of the peace see title MAGISTRATES as to existing officers, see note (*g*) *supra* and as to borough officers, see p 311 *ante*.

## PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

**731** Paid officials in the permanent employment of the county council who are required to devote their whole time to such employment are not eligible to serve in Parliament (s)

**Section 8  
The  
County**

(n) *Clerk of the Peace and of the County Council*

**732** Subject to special provisions affecting certain counties the clerk of the peace of the county is also clerk of the county council (t)

**Ineligibility  
for  
Parliament  
Appointment**

He is appointed and is removable by the standing joint committee of the county council and the quarter sessions (a)

**733** Subject to the provisions of any scheme or order (b) which may deal with his powers and duties (c) the clerk of the peace has charge of and is responsible for the records and documents of the county subject to any directions of the *custos rotulorum* (d) or quarter sessions or the county council (e) Returns and information required by either House of Parliament to be sent to the Secretary of State or Local Government Board must be made and furnished by him (f) He is under the same obligation as the town clerk of a borough to make financial returns each year to the Local Government Board (g)

**Duties.**

**Returns**

If the office of clerk of the peace becomes vacant the existing deputy or if there be no such deputy or none willing to act any person appointed by the county council may act temporarily in the office until a person is duly appointed to fill the vacancy and while so acting is in the same position as to remuneration scope of powers and duties and otherwise as the clerk whose place he fills but his power so to act is limited to a period of six months from the occurrence of the vacancy (h)

**Temporary  
vacancy in  
office**

(s) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (13)

(t) As to the clerk of the peace generally see title **MAGISTRATES** pp 624 *et seq post*

(a) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (2)

(b) *I.e.* made under the Local Government Act 1888 (51 & 52 Vict c 41)

(c) Local Government Act 1888 (51 & 52 Vict c 41) s 59 (4) (a) As to the clerk's duties with regard to elections see title **ELECTIONS** Vol **XII** pp 195 *et seq*

(d) This officer is the principal justice of the peace and civil officer of the county and keeper of its records. He was originally appointed by the Lord Chancellor and subsequently by the Crown (stat (1546) 37 Hen 8 c 1 s 1 repealed by stat (1549) 3 & 4 Edw 6 c 1, but confirmed by stat (1689) 1 Will & Mar c 21 s 3) He formerly appointed the clerk of the peace (*ibid* ss 4 & 5). Penalties were imposed upon the *custos rotulorum* who sold or received gratuities and upon the clerk of the peace who purchased or gave such gratuities as a consideration for appointment to the office (*ibid* s 7) and see further title **MAGISTRATES** p 624, *post*. The clerk of the peace acts as the deputy of the *custos rotulorum* in the matter of keeping the records and documents of the county

(e) Local Government Act 1888 (51 & 52 Vict. c. 41) s 83 (3) As to such documents as were the records of or were in the custody of the quarter sessions in 1888 see *ibid* s. 64 (1) (a)

(f) *Ibid* s 83 (12) It is the duty of the county council to cause its clerk or other officer to make these returns (*ibid*)

(g) Municipal Corporations Act, 1882 (45 & 46 Vict. c 50) s 28 (51 & 52 Vict. c 41) applied to county councils by the Local Government Act, 1888 (51 & 52 Vict. c 41) s 75 see p 824, *ante*.

(h) **Recorders, Stipendiary Magistrates, and Clerks of the Peace Act, 1906** (6 Edw 7, c 46), s 1 (2) (3)

SECT 8  
The  
County

The chairman also has power where there is no clerk to the council and no deputy or if both are incapable of acting to appoint a person to take the place of the clerk in respect of any acts authorised or required to be done by or with respect to the clerk (i)

(iii) Deputy Clerk

Appointment

**734** A deputy clerk may be appointed by the standing joint committee (k) to hold office during its pleasure and to act as clerk during the illness or absence of the clerk of the peace or in the event of his death, or in such other case as the committee may determine. When so acting the deputy has all the powers and capacities of the clerk of the peace or clerk of the council (l)

(iv) County Treasurer

Appointment  
salary etc

**735** The appointment removal and determination of the salary of the county treasurer are vested in the county council (m) which deals with such matters under the enactments formerly existing (n), unless it resolves to adopt the provisions of the Municipal Corporations Act 1882 (o) relating to the treasurer of a municipal corporation which they are expressly empowered to do (p) and in this event the earlier enactments are superseded (q). Failing such adoption the treasurer is appointed under the powers formerly possessed by the justices in quarter sessions who could appoint and remove the county treasurer at pleasure, allowing him such reasonable salary out of the county rate as they thought fit, and require him to give security for the proper discharge of his duties (r).

During the vacancy of the office or the incapacity of the treasurer, acts required or authorised to be done by or in respect of him can

(i) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 43 applied by the Local Government Act 1888 (51 & 52 Vict c 41) s 70

(j) Deputies were formerly appointed and removed by the clerks of the peace themselves (stat (1689) 1 Will & Mar c 21) s 4) and clerks of the peace holding office on 13th August 1881 still retain that privilege (Local Government Act 1888 (51 & 52 Vict c 41) s 118 (1)) except in the Duchy of Lancaster as to which see Local Government Act 1888 (51 & 52 Vict c 41) ss 83 (9) 118 (1). In the event of a clerk having such power to appoint or remove a deputy and being unable to do so by reason of illness absence or other cause the council may do so on his behalf and may assign a portion of his salary or remuneration to such deputy (Recorders Stipendiary Magistrates and Clerks of the Peace Act 1906 (6 Edw 7 c 46) s 1 (1)).

(k) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (4). This provision is without prejudice to the appointment of a deputy clerk for the purpose of a second court on the division of the court of quarter sessions for judicial business (*ibid*) which power was exercisable by the clerk of the peace or his deputy under the Stipendiary Magistrates Act 1858 (21 & 22 Vict. c. 73) ss 9—11 see title MAGISTRATES p 626 *post*

(l) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (x)

(m) See the text *infra*

(n) 45 & 46 Vict c. 50 s 18 as to which see p 313 *ante*. This provision does not apply unless the council so resolve

(o) Local Government Act 1888 (51 & 52 Vict c 41) s 75 (16) (e)

(p) *Ibid*

(q) County Rates Act 1738 (12 Geo 2 c 29) ss 6 11. County Rates Act 1815 (55 Geo 3, c 51) s 17. His salary was formerly fixed at £20 a year (*ibid*)

be performed by or in respect of any person appointed for that purpose by the chairman (s)

SECT 8  
The  
County

Duties as to  
(i) county  
rates

**736** The treasurer must keep books of entries of all moneys received and payments made in respect of the county rates and is required to deliver accounts upon oath if required of all such receipts and payments distinguishing the particular uses to which the moneys have been applied together with proper vouchers for the same (t) All such accounts and vouchers are to be deposited with the clerk of the peace of the county (a) and to be open to inspection by the county councillors without fee or reward (b) Upon the passing of his accounts by the county council the treasurer is completely discharged (c)

It is the duty of the treasurer to receive all payments made to the county fund and to make all payments thereout (d)

(ii) county  
fund

The treasurer must obey the orders of the court of quarter sessions or of any justice or justices out of sessions for the payment of the costs of criminal proceedings and of such other costs as they are empowered to order, and for such purpose he or some other person on his behalf is to attend at every court of quarter sessions (e) Such payments do not require the formalities of ordinary payments out of the county fund (f)

(iii) costs in  
criminal  
cases

The treasurer is under obligation to make certain financial returns to quarter sessions boroughs in the county and also to county boroughs relating to the costs of criminal proceedings at the assizes in respect of offenders committed for trial from the boroughs and also particulars as to expenditure out of the county rate for general county purposes when the boroughs are liable to contribute to the county rate (g)

(iv) financial  
returns

(a) This appears to be so from the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 43 which is applied to county councils by the Local Government Act 1888 (51 & 52 Vict c 41) s 75

(t) County Rates Act 1738 (12 Geo 2 c 29) s 7 He must keep separate accounts of sums received by him in connection with the county police and such accounts when passed must be deposited with the other county documents (County Police Act 1839 (2 & 3 Vict c 93) s 23) and see title *FOURICE*

(a) County Rates Act 1738 (12 Geo 2 c 29) s 8 The statute also provided that the deposit might be made with the town clerk high bailiff or chief officer of any city town corporate or liberty (*ibid*) but such provision may now be rejected as obsolete so far as county accounts are concerned as to clerks of the peace and of the county councils see p 343 *ante*

(b) County Rates Act 1738 (12 Geo 2 c 29) s 8

(c) *Ibid* s 9

(d) Local Government Act 1888 (51 & 52 Vict c 41) s 80 (1) as to the county fund see further p 358 *post*

(e) Local Government Act 1888 (51 & 52 Vict c 41) s 67 As to the costs of criminal proceedings see title *CRIMINAL LAW AND PROCEDURE* Vol IX pp 445 *et seq* A justice may make an order on the treasurer to pay the expenses of burying dead bodies cast up from the sea or from tidal or navigable waters, see title *BURIAL AND CREMATION* Vol III, p 548

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 80 (1), as to those formalities see p 358 *post*

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 153 applied to county boroughs by the Local Government Act, 1888 (51 & 52 Vict c 41), s 32 (8)

## SECT 8

The  
CountyTreasurer's  
accounts

**737** The treasurer's accounts are passed and his discharge is given by the county council as successors to the county quarter sessions (*h*). The accounts are audited with the other accounts of the council (*i*) and must be made up half yearly to such dates as the council, with the approval of the Local Government Board appoints (*k*) and after the audit of the accounts of the county council for the second half of each financial year the treasurer must print a full abstract of his accounts for that year (*l*)

(v) *County Surveyor*

Appoint-  
ment salary

**738** The county surveyor is appointed by the county council as successor to the county quarter sessions. His remuneration is paid by the county council and it has power to remove him (*m*). There is no statute which governs his appointment or which confers the power of such appointment on any authority except in so far as justices were empowered to appoint such surveyors for the repair of public bridges (*n*) and to allow them their reasonable costs and charges (*o*).

## Duties

The duties of the surveyor have relation chiefly to main roads, bridges and other property of the council (*p*).

(vi) *Medical Officer of Health*

Nature of  
appointment

**739** A county council must appoint a medical officer of health and may appoint more than one (*q*). He cannot be appointed for a limited period only though with the consent of the Local Government Board temporary arrangements may be made for the performance of the duties of a medical officer of health and the person appointed under these temporary arrangements has the full powers of the medical officer of health of the county (*r*). He is not removable without the consent of the Local Government Board (*s*).

(*h*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (*m*)

(*i*) *Ibid* s 71 (*j*) and see p 363 *post*

(*k*) Local Government Act 1888 (51 & 52 Vict c 41) s 71 applying the provisions of the Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 26—28 to county councils. If there be no such appointment the dates are to be those previously in use (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 26). See further as to accounts and audit p 362 *post*

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 27 (2) applied by the Local Government Act 1888 (51 & 52 Vict c 41) s 1 (*r*)

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (*x*)

(*n*) Statute of Bridges 1830 (22 Hen 8 c 5) ss 3 4 see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 181

(*o*) Statute of Bridges 1830 (22 Hen 8 c 5) s 6

(*p*) See title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 196 *et seq*

(*q*) Local Government Act 1888 (51 & 52 Vict c 41) s 17 as amended by the Housing Town Planning etc Act 1909 (9 Edw 7 c 44) s 68. The power of county and district councils to arrange for a medical officer for the county to act for an urban or rural district is abolished without prejudice to any arrangement existing before the 3rd December, 1909 (Housing Town Planning, etc Act 1909 (9 Edw 7, c 44) s 68 (3)).

(*r*) *Ibid* s 68 (4)

*Ibid*, s 68 (5).

## PART I—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

**740** The medical officer must possess the same qualifications as are stated to be required in the case of an urban district (t) He cannot engage in private practice, nor can he hold any other public appointment without the express written consent of the Local Government Board (a)

SECT 8  
The  
County  
Qualifica-  
tions

**741** The duties of the medical officer are such as are prescribed by general order (b) of the Local Government Board and such as are assigned by the county council (c)

Duties

### (11) Other Officers

**742** In addition to the foregoing officers a council must appoint inspectors of weights and measures (d), public analysts (e), agricultural analysts and official samplers or may, in the case of such agricultural analysts and samplers concur with other councils in making a joint appointment (f) It may if thought fit appoint inspectors for the proper execution of the statutes relating to the hours of employment in shops (g)

Appointment

## SUB SECT 4—Proceedings

### (1) Of the Council

**743** The meetings and proceedings of the county council are regulated and governed in the same way as those of a borough council (h) with certain modifications—namely (i) that the first quarterly meeting of a newly elected council is held on the 16th March or such other day within ten days after the ordinary day of retirement of county councillors as the council may fix (z) (ii) that the first quarterly meeting in any year not being the year for the election of the council may be held on such day in March April or May as the council may determine (k) (iii) that the county council may fix the hour of the quarterly meeting (l) (iv) that the quorum of the council is one fourth instead of one

Regulations  
as to meetings  
and pro-  
ceedings

(t) Local Government Act 1888 (51 & 52 Vict c 41) s 18 and see p 276 *ante*

(a) Housing Town Planning etc Act 1909 (9 Edw 7 c 44) s 68 (7)

(b) The general order must be communicated to the county council and laid before Parliament as soon as possible If an address is within a period of twenty one days presented by either House to His Majesty praying that the order may be annulled His Majesty in Council may annul the order and it thereupon becomes void but without prejudice to the validity of anything previously done under it (*ibid* s 68 (8))

(c) *Ibid* s 68 (2) For the purpose of such duties he has the same power of entry on premises as are possessed by a medical officer of health of a district (*ibid* s. 68 (4))

(d) See title WEIGHTS AND MEASURES

(e) See title FOOD AND DRUGS Vol XV pp 8 *et seq*

(f) See title AGRICULTURE Vol I pp 287 289

(g) See title FACTORIES AND SHOPS Vol XIV, p 528

(h) Local Government Act 1888 (51 & 52 Vict. c. 41) s 10 as to borough council meetings see p 314 *ante*

(i) County Councils (Elections) Act, 1891 (54 & 55 Vict c 68) s. 1 (3)

(k) County Councils (Elections) Amendment Act, 1900 (63 & 64 Vict. c 13)

s. 2.

(l) County Councils (Elections) Act 1891 (54 & 55 Vict c 68), s 1 (3).

## SECT 8

The  
County

third of the whole number as in the case of a borough council (*m*), (*v*) that the meetings may be held at any place, either within or without the county as the council may determine (*n*)

Restrictions  
on voting

**744** The county councillors of a larger quarter sessions borough (*o*) cannot act or vote on any question relating to matters involving expenditure on account of which the parishes in the borough are not liable to be assessed equally with the rest of the county to county contributions (*p*) nor may a member of the council nor of a committee of the council, vote upon any resolution or question proposed or arising in relation to unhealthy areas or unhealthy dwelling houses under the statutes relating to the housing of the working classes if the resolution or question affects a house building, or land in which he is beneficially interested (*q*)

Attendance of  
public

**745** It would seem that the ratepayers much less the general public cannot claim an absolute right to admission to the meetings without the council's consent express or implied (*r*)

(11) *Of the Committees*(a) *Under the Local Government Act 1888*Duty and  
power to  
appoint  
committees

**746** Every county council (*a*) must appoint a finance committee to regulate and control the county finances (*b*), and other committees may be appointed for such purposes as the council deems advisable (*c*) including the exercise of any transferred powers other than those of raising money by rate or loan (*d*)

Proceedings  
of com-  
mittees

**747** The council may provide for the quorum, proceedings, area of authority and place of meeting (*e*) of a committee but subject thereto the committee may regulate its own proceedings, quorum, and place

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 75 (15)

(*i*) *Ibid* s 75 (21)

(*j*) As to these see p 312 *post*

(*p*) Local Government Act 1888 (51 & 52 Vict c 41) s 30 (6)

(*q*) Housing of the Working Classes Act 1890 (53 & 54 Vict c 60) s 85 (1) penalty £50 but the vote does not invalidate the proceedings (*ibid* s 85 (2))

(*r*) See *Tenby Corporation v Mason* [1908] 1 Ch 457 (CA) *Lurcell v Smiler* (1811) 2 C P D 215 219 CA *Pitard v Oliver* [1891] 1 Q B 414 41 CA and *Royal Aquarium and Summer and Winter Garden Society v Larminson* [1892] 1 Q B 431 CA As to admission of Press representatives, see title PRESS AND PRINTING

(*a*) This provision of the Local Government Act 1888 (51 & 52 Vict c 41) does not apply to county boroughs (*ibid* s 80 (5)). They are otherwise provided for see p 300 *ante*

(*b*) Local Government Act 1888 (51 & 52 Vict c 41) s 80 (3) A liability exceeding £50 may not be incurred without a resolution of the council passed on an estimate submitted by the finance committee and after a notice of the meeting at which the resolution is passed stating the amount and purpose of such liability (Local Government Act 1888 (51 & 52 Vict c 41) s 80 (3) (4)) This is not applicable to county boroughs (*ibid* s 80 (5)) see p 300 *ante*

(*c*) *Ibid*, s. 75 applying for this purpose the provisions of the Municipal Corporations Act 1882 (45 & 46 Vict c 50) see p 300 *ante*

(*d*) Local Government Act 1888 (51 & 52 Vict c 41) s 28 (2) (3)

(*e*) The place of meeting may be either within or without the county (*ibid*, s. 75 (21) 82 (1))

of meeting (f) Such proceedings must be reported to the council but if and so far as the council directs, they need not be submitted for the approval of the council (g), so that unlike a borough council, a county council may delegate executive powers to its committees. In all other respects the meetings and proceedings are governed by the provisions applicable to the committees of borough councils (h).

SECT 3  
The  
County

748 A standing joint committee of the quarter sessions and the county council is necessary for the purpose of dealing with matters relating to the police to the clerk of the peace or to clerks of the justices and other joint officers, and for the purpose of dealing with matters requiring to be determined jointly by the quarter sessions and the county council (i). The acts and proceedings of this committee need not be submitted for the approval of the county council (k).

Joint  
committees  
(1) Standing  
joint  
committee

A joint committee may also be provided for the exercise of powers and duties affecting two or more counties transferred by the Local Government Board under provisional orders (l), or for the enforcement of the law against river pollution (m) in the case of a river or part thereof passing through several administrative counties (n) for the valuation of a county and county borough when necessary for calculating contributions and payments (o) for the purpose of administrative business in the counties of York Lincoln Sussex Suffolk, and Northampton (p) and for matters affecting the assize courts at Manchester and other property formerly vested in the justices of the peace of the county palatine of Lancaster (q).

(11) for  
exercise  
transferred  
powers

For any purpose in which a county council or court of quarter sessions or council of a county borough is jointly interested a joint committee may be constituted out of those respective bodies to exercise within their delegation all such powers as the appointing body might exercise for the purposes for which the joint committee is constituted, other than the making of a rate or the borrowing of money (r).

(111) for  
matters  
of joint  
interest

A standing joint committee governed by the above provisions

(1111) for two  
or more  
administra-  
tive counties

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 82(1) The chairman has a second or casting vote (*ibid*)

(g) *Ibid* s 82 (2) The above provisions apply to joint committees (*ibid* s 82 (3))

(h) *Ibid* s 75 as to these see p 316 *ante*

(i) Local Government Act 1888 (51 & 52 Vict c 41) ss 9 30 As to police see title POLICE

(k) Local Government Act 1888 (51 & 52 Vict c 41) s 77 (16) (f) The power of determining the places at which quarter sessions for the county of London shall be held is vested in the London County Council and not in the standing joint committee (*Standing Joint Committee of Quarter Sessions and County Council of the County of London v London County Council* (1911) 7 J P 405) as to places outside the county of London see *ibid* per Lord ALVERSTONE O J at p 458 *Re Somerset County Council* (1889) 64 J P 182

(l) Local Government Act 1888 (51 & 52 Vict c 41) s 10

(m) Rivers Pollution Prevention Act 1876 (39 & 40 Vict c 75) see also Rivers Pollution Prevention (Border Councils) Act 1898 (61 & 62 Vict c 34) see also title WATERS AND WATERCOURSES

(n) Local Government Act 1888 (51 & 52 Vict c 41) s 14 see title WATERS AND WATERCOURSES

(o) Local Government Act, 1888 (51 & 52 Vict c 41) s 33 (2)

(p) *Ibid* s 46

(q) *Ibid*, s. 47

(r) *Ibid*, s 81



**SECT 8**  
**The**  
**County**

relative to joint committees generally, may also be appointed for two or more administrative counties, including county boroughs. In that case the members thereof are appointed by the quarter sessions and councils in such proportion and manner as they may arrange or, in default, as may be determined by a Secretary of State (s).

(b) *Under other Statutes*

**Compulsory**  
**committees**

**749** The county council is required to establish a public health and housing committee (t) an education committee (a) a small holdings and allotments committee (b), if a hospital district has been constituted a hospital committee (c) a diseases of animals committee (d) under certain conditions an unemployment committee (e), and a local pension committee (f).

**Powers of**  
**delegation**

In addition to the power of delegating powers and duties to committees, county councils have large powers to delegate to district councils and to the justices sitting in petty sessions (g) in manner directed by various special enactments (h).

**SUB SECT 5 — Financial Relations**

(1) *Between County Councils and the Exchequer*

**Contributions**  
**from the**  
**Exchequer**

**750** Every county council including the council of a county borough is entitled to receive grants or assistance from moneys which would otherwise go to the national Exchequer. This is effected by allowances to the county council of certain licence duties and grants from the Local Taxation Account (i).

**Collection**  
**and retention**  
**of local**  
**taxation**  
**duties**

Since the 1st January 1909 (k) the county councils (l) have been empowered to collect and retain the duties on certain taxation

- (g) Local Government Act 1888 (51 & 52 Vict c 41) s 81 (7) (8)  
 (t) Housing Town Planning etc Act 1909 (9 Edw 7 c 44) s 71 (1) see title PUBLIC HEALTH AND LOCAL ADMINISTRATION  
 (a) See title EDUCATION Vol XII pp 19 113  
 (b) See title ALLOTMENTS Vol I p 342 SMALL HOLDINGS AND SMALL DWELLINGS  
 (c) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION  
 (d) See title ANIMALS Vol I pp 429 401  
 (e) See title WORK AND LABOUR  
 (f) See title POOR LAW 1 or asylum visiting committees see title LUNATICS AND PERSONS OF UNSOUND MIND p 46, *post* for joint committees under the Light Railways Act 1896 (59 & 60 Vict c 48) see title TRAMWAYS AND LIGHT RAILWAYS for fishery committees see title FISHERIES Vol XIV p 622 for committees under the Midwives Act 1902 (2 Edw 7 c 17) see titles MEDICINE AND PHARMACY PUBLIC HEALTH AND LOCAL ADMINISTRATION  
 (g) See Local Government Act 1888 (51 & 52 Vict c 41) s 28 (2) (3) Explosives Act 1875 (38 & 39 Vict c 17) They may employ a district council as agent (Local Government Act 1894 (56 & 57 Vict c 73) s 64)  
 (h) *E.g.* Isolation Hospitals Act 1893 (56 & 57 Vict c 68) Midwives Act 1902 (2 Edw 7 c 17) s 9 Education Act 1902 (2 Edw 7 c 42) s 17 Shop Hours Act 1904 (4 Edw 7 c 31), s 9 Small Holdings and Allotments Act 1908 (8 Edw 7, c 86) ss 18 50 Cinematograph Act 1909 (9 Edw 7 c 30) s 5 Housing Town Planning etc Act, 1909 (9 Edw 7, c 44) s 71  
 (i) Local Government Act 1888 (51 & 52 Vict c 41) s 34 (1) As to this account see p 351 *post*  
 (k) The day fixed by Order in Council dated 19th October, 1908, and made under the Finance Act 1908 (8 Edw 7 c 16) s 6 (2)  
 (l) Including the councils of county boroughs (Finance Act, 1908 (8 Edw 7, c 16) s 6 (1),

## PART I.—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

licences (*m*), and towards the expenses of such collection have each received annually a share of a sum of £40 000, paid out of the Consolidated Fund to the Local Taxation Account (*n*) such share being based upon the proportion of the proceeds of the duties so collected in each county during the preceding year (*o*)

SECT  
The  
County

The duties so leviable consist of those on licences for dealing in and killing game for dogs guns, carriages including the additional charges on motor cars (*p*) armorial bearings and male servants In the event of any such duty being altered the power to collect it ceases unless provision is made to the contrary (*q*) As regards the additional duties on motor cars (*r*) although the county councils collect such duties they are only entitled to retain such an amount as is equal to the amount of such duties during the year ending 31st March, 1910 Any excess is paid into the Exchequer and in the event of the amount collected in any year being less than the amount so fixed the deficiency is to be made good to the county councils out of the Consolidated Fund (*s*)

**751** The Local Taxation Account is an account at the Bank of England into which are paid the following moneys and from which contributions as fixed by the Local Government Board are paid to the county councils (*t*) The moneys which make up this account besides the £40 000 before mentioned (*a*) are (i) local taxation licence duties not collected by the county councils (ii) local taxation (customs and excise) duties (iii) estate duty grant (iv) agricultural rates grant (v) those under the Tithe Rent Charge (Rates) Act 1899 (*b*)

(i) Grants from  
the Local  
Taxation  
Account  
Constitution  
of the  
account

When occasion requires the fund can be supplemented by the Local Government Board borrowing temporarily on the security of the account sums which must be repaid with the interest during the same financial year out of moneys payable to the account (*c*)

**752** The Exchequer Contribution Account is an account which must be kept by the county councils and councils of county boroughs

Exchequer  
Contribution  
Account  
and its  
application

(*m*) Formerly the duties were collected in the same way as those which have not been transferred see title REVENUE

(*n*) See the text *infra*

(*o*) Finance Act 1908 (8 Ldw 7 c 16) s 6 (1)—(*o*) Order in Council 19th October 1908

(*p*) Locomotives on Highways Act 1896 (59 & 60 Vict c 36) s 8 see title STREET AND AERIAL TRAFFIC but see *infra* as to the additional duties imposed in 1910

(*q*) Finance Act 1908 (8 Edw 7 c 16) s 6 (4) See titles ANIMALS Vol I p 403 GAME Vol XV p 246 REVENUE STREET AND AERIAL TRAFFIC As to collection etc see Local Government Act 1888 (51 & 52 Vict c 41) s 20 Finance Act 1908 (8 Edw 7, c 16) s 6

(*r*) Finance (1904 10) Act 1910 (10 Edw 7 c 8)

(*s*) *Ibid* s 88 (2) This provision has now been extended to the duties on all carriage licences, whether licences for motor cars or not (Revenue Act 1911 (1st Supp. c 2) s 18 (1)) see title REVENUE

(*t*) Local Government Act 1888 (51 & 52 Vict c 41) s 20 (1) The Board may vary the certificate but until varied it is conclusive (*ibid* s 20 (2))

(*a*) See the text *supra*

(*b*) See titles RATES AND RATING REVENUE

(*c*) Local Government Act 1888 (51 & 52 Vict c 41) s 21 (3) The Bank of England may lend the moneys (*ibid*)

**SECT 8**  
**The**  
**County**

Contribu-  
tions out  
of Exchequer  
Contribution  
Account for  
(i) teachers  
and public  
vaccinators  
(ii) paupers  
school  
(iii) medical  
officer of  
health or  
inspector of  
nuisances

(iv) registrar  
of births and  
deaths

separate from other accounts and into which are paid the share received from the duties on local taxation licences, whether collected by themselves or received from the Local Taxation Account (d) the share received from the same account in respect of customs and excise duties (e) and the state duty grant (f)

Certain contributions in aid of local rates are payable out of the county fund and charged to the Exchequer Contribution Account (g) The grants are as follows —

(i) A grant towards the remuneration of teachers in poor law schools and for payments to public vaccinators (h) the amount being certified by the Local Government Board (i),

(ii) A grant of school fees paid for pauper children (j)

(iii) A payment to every local authority whose area is wholly or partly in the county of half the salary of a medical officer of health or inspector of nuisances appointed by such authority in accordance with the regulations made by the Local Government Board under the Public Health Acts or any pre existing Acts subject in the case of the medical officer to a forfeiture of such sum to the Crown (l) in the event of the Board certifying to the county council that he has neglected his duty under the regulations to send proper reports and returns to the Board (m)

(iv) A payment to the guardians who pay the registrars of births and deaths for a district wholly or partly in the county equal to the amount paid out of local grants towards their remuneration during the financial year ending on the 31st March, 1889 (n)

(d) Local Government Act 1888 (51 & 52 Vict c 41) s 23 (1) (a)

(e) Local Taxation (Customs and Excise) Act 1890 (53 & 54 Vict c 60) s 1 (1) (b)

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 23 (1) (b) As to the application of the account see *ibid* ss 23 34 (1) (e)

(g) *Ibid* s 24 (1) (2) The claim for the grant must be submitted in accordance with the requirements of the Board and the amount is fixed on the same principles as was the case previous to 1888 (*ibid* s 24 (6)). These contributions are substituted for annual local grants out of the Exchequer made prior to 1888. The grants were held payable in respect of the period between 21st September 1883 and April 1889 (*Re West Riding County Council* (1890) 54 J P 553). As to the extension of these grants to medical officers of health and sanitary inspectors in London see the Public Health (London) Act 1891 (54 & 55 Vict c 76) s 108 (1)

(h) Under the Vaccination Act 1867 (30 & 31 Vict c 84) s 5 see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(i) Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (a) and see title EDUCATION Vol XII p 88. If the union or area is situate in more than one administrative county a proportionate part as certified by the Local Government Board is payable by the councils of each of such counties (Local Government Act 1888 (51 & 52 Vict c 41) s 24 (5)). The certificate of the Board may be varied, but until varied it is conclusive (*ibid* s 24 (7))

(j) *Ibid*, s 24 (2) (b) and see title EDUCATION Vol XII p 88

(l) The payment is effected by the amount being deducted from the amount payable to the county council out of the Local Taxation Account and instead of being handed over to the county council is paid to the Exchequer or other rightful recipient (Local Government Act 1888 (51 & 52 Vict c 41) s 27 (1))

(m) *Ibid* s 24 (2) (c) for cases where the area is situate in more than one administrative county see note (r) *supra*

(n) Local Government Act 1888 (51 & 52 Vict c 41), s 24 (2) (d), for

SECT 8  
The  
County

(v) A transfer to the account of the county fund (o)  
(vi) a payment to the guardians of every poor law union wholly or partly in the county (p) and

(vii) a payment to the council of each borough (q) in respect of the maintenance of certain pauper lunatics (r)

(viii) The transfer to the account of the county fund charged with the compensation for deficiencies in fees payable to the clerk of the peace of the county or any other officer of quarter sessions for the county (s), of the amount of such compensation (t)

(ix) A transfer to the police account of the county fund (a)

(x) a payment to the council of each borough maintaining a separate police force (b) and

(xi) if within the county sums are raised by rates for the purpose of the metropolitan police a payment to the receiver for the metropolitan police district (c)

in respect of the police of such county or borough or district (d)

(xii) The guardians of every poor law union wholly or partly in the county are entitled to receive from the county council (not being the London County Council) an annual sum for the costs of the officers of the union and of district schools to which the union contributes certified by the Local Government Board and repaying the expenditure of the guardians for the year ending 25th March 1889 on the salaries remuneration and superannuation allowances of the officers other than teachers in poor law schools, and on drugs and medical appliances (c)

(v) (vi)  
(vii) pauper  
lunatics  
(viii) clerk  
of the peace  
or officer of  
quarter  
sessions  
(ix) county  
police  
(x) borough  
police  
(xi) metro  
politan  
police  
(xii) poor law  
officers

(11) Between County Councils and Boroughs

**753** The financial arrangements between counties and county boroughs within the area of the counties respecting the distribution of the proceeds of local taxation licences, probate (now estate) duty grant and all other financial relations were adjusted at the outset either by agreement or by commissioners appointed for such purpose (f). All original and future adjustments were made and are

Adjustment  
of finances  
between  
counties and  
county  
boroughs

cases where the district is situate in more than one administrative county see note (v) p 302 ante

(o) See Local Government Act 1888 (51 & 52 Vict c 11) s 24 (2) (e)

(p) See *ibid* s 24 (2) (f) for case where the union is situate in more than one administrative county see note (v) p 302 ante

(q) See Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (g)

(r) See further title LUNATICS AND DEFECTS OF UNDERSTANDING p 490 post

(s) Under the Criminal Justice Act 1855 (18 & 19 Vict c 196), s 18 see title MAGISTRATES p 625 post

(t) Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (h)

(a) *Ibid* s 24 (2) (i) see title POLICE

(b) See Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (j) and title POLICE

(c) See Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (k). As to the manner in which the payment is made see *ibid* s 24 (1) and title POLICE

(d) See generally title POLICE

(e) Local Government Act 1888 (51 & 52 Vict c 41) s 26 (1). The payment is apportioned when the union is situate in more than one county (*ibid* s 26 (2))

(f) *Ibid* s 32 (1). Provision was made by the Act for the contributions to be paid pending the operation of the adjustment (*ibid* s 32 (7)). If the county borough is deemed to be in more than one county the necessary adjustment must be made between the counties (Local Government Act, 1888

SECT 9  
The  
County

Method of  
adjustment  
General pro  
visions as to  
adjustment

readjustable at the end of five years of their operation if the Local Government Board is satisfied that they are inequitable. Failing agreement the adjustment is effected by an arbitrator appointed by the Board (g).

In making the adjustment regard must be had to all the circumstances of each case to the existing property, debts and liabilities connected with the financial relations of the county and borough, and to the consideration that the county is not to suffer financially by reason of the boroughs therein being constituted county boroughs and that the county borough is not to be in a worse financial position than it would have been in had it remained part of the county and had it shared in the grants of licence and estate duties. Regard must also be had to the benefit and value of the services which the borough receives in return for existing contributions (h). The adjustment should also provide in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of the borough to contribute and for equitable provision for the cessation of existing liabilities to contribute or to incur future expense (i).

Former  
exemption  
of boroughs  
having  
separate  
quarter  
sessions.

**754** Boroughs having a separate court of quarter sessions were formerly wholly exempt from contributing to any rate or assessment in and for the county (k) but they were liable to pay any sums expended out of the county rate which were not otherwise paid or chargeable in respect of the costs of the maintenance, conveyance, transport or punishment of all offenders committed for

(j1 & j2 Vict c 41) s 32 (2)) County boroughs are entitled to receive a share from the Local Taxation Account as other administrative counties (*ibid* s 33).

(g) *Ibid* s 32 (6). As to the powers of such arbitrator see *ibid* s 62. As to the power of the county council and the council of a county borough to arrange as to police see Local Government Act 1888 (j1 & j2 Vict c 41) s 33 (1) and title POLICE.

(h) Local Government Act 1888 (j1 & j2 Vict c 41) s 32 (j). The statutory provisions relating to the adjustment of property income debts liabilities and expenses and as to borrowing for such purpose are made applicable to this adjustment (*ibid* s 32 (5)). As to these see *ibid* s 62 and p 357 *post*.

(i) Local Government Act 1888 (j1 & j2 Vict c 41) s 32 (1). The equitable adjustment here referred to does not include compensation for the loss of contributing area. It does not contemplate that the whole financial position of the county and county borough is to remain the same relatively to each other but that the position as regards the distribution of Exchequer contributions shall remain the same relatively and the words "equitable provision for such cessation" mean that in adjusting the financial relations equitable provision must be made for the county and the county borough to bear that burden which was formerly joint but is no longer so (*West Hartlepool Corporation v Durham County Council* [1901] A.C. 246 following the principles laid down in *Caterham Urban Council v Godstone Rural Council* [1904] A.C. 111). As to adjustments see generally Local Government Act 1888 (j1 & j2 Vict c 41) ss 32-62. Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 15. An agreement embodying a compromise of certain claims one of which is not well founded in law cannot be set aside on that ground (*Holworthy Urban Council v Holworthy Rural District Council* [1901] 2 Ch 62).

(k) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 150 (1). Power was reserved to collect the arrears of a county rate made before the grant of a separate court of quarter sessions (*ibid* s 150 (2)) but this can have no operation now having regard to the provisions governing newly constituted quarter sessions boroughs, see p 373 *post*.

trial from the borough to the assizes for the county (*l*) and if such a borough was before the 11th July 1832 chargeable with or liable to contribute to the county rate it was to continue to be liable to contribute not only for the last mentioned purpose but for general county purposes with certain limitations (*m*)

SECT 8  
The  
County

**755** The exemption from contributing to the county rate is now partially removed in the case of larger quarter sessions boroughs namely those not being county boroughs (*n*) having a population of 10 000 and upwards according to the census of 1881. In such cases the parishes in the borough are liable to be assessed to county contributions as the rest of the county (*o*) with the following exceptions —

Position of  
larger  
quarter  
sessions  
boroughs

Where such borough on the 13th August 1888 was wholly or partly exempt from contributing towards costs incurred for any purpose for which the quarter sessions of the county are authorised to incur costs the borough is not to be assessed by the county council to county contributions for costs incurred for such purpose or if partially exempt beyond such partial exemption (*p*). But this exemption does not extend to any costs incurred for the purpose of any powers duties or liabilities of the justices of the borough which are transferred to the county council (*q*) nor does it extend to any costs of or incidental to the assizes of the county (*a*). The payment of these latter and of the costs of sessions are general county purposes to which the borough is assessed (*b*).

Total or  
partial  
exemption  
from county  
contributions.

The costs of prosecution and defence which the county council is ordered to pay (*c*) may be adjusted between the borough and the county council by agreement or, in default of agreement by the Local Government Board. The Board may either determine the matter as arbitrators or otherwise and may hold a local inquiry (*d*).

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 151 see *R v Monck* (1877) 2 Q B D 544 (C A)

(*m*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 151 (1). The general county purposes did not include costs arising out of coroners inquest or expenses incurred under the Sale of Food and Drugs Act 1875 (38 & 39 Vict c 63) in respect of the county (see title FOOD AND DRUGS Vol XV p 34) or where the borough had an inspector of weights and measures the expenses of the inspection of weights and measures for the county or payments to or in respect of special constables (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 152 (2)).

(*n*) As to these see p 300 *ante*

(*o*) Local Government Act 1888 (51 & 52 Vict c 41) s 35 (1)

(*p*) *Ibid* s 35 (2)

(*q*) As to these see p 371 *post*

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 35 (2)

(*b*) *Ibid* s 35 (5) see also the Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) and title CRIMINAL LAW AND PROCEDURE Vol IX pp 445 *et seq*. As to the liability in respect of main roads see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 26 *et seq*

(*c*) See p 345 *ante*

(*d*) Costs in Criminal Cases Act, 1908 (8 Edw 7, c 15) s 4 (4) and see title CRIMINAL LAW AND PROCEDURE Vol IX p 446. If the board determines the matter as arbitrator the provisions of the Regulation of Railways Act, 1868 (31 & 32 Vict c 119) and amending Acts apply. If a local inquiry is held the Local Government Act, 1888 (51 & 52 Vict c 41) s 87 (1) (*v*),

**SECT 5****The  
County**

The county council and the borough council may agree for the cessation wholly or partly of any of the above exemptions in return either for a capital sum or for an annual payment or for a transfer of property or liabilities or for the undertaking by the county council of any powers or duties, or in any other manner agreed upon (e)

**Position of  
smaller  
quarter  
sessions  
boroughs**

**756** The parishes of smaller quarter sessions boroughs may be assessed to all county contributions (f) and the liability to pay expenses in connection with prisoners committed for trial to the county assizes is the same as that of the larger quarter sessions boroughs (g). The property debts and liabilities of the county and of any such borough were adjusted between them (h)

**Other  
boroughs**

**757** A borough with a population of 10 000 and more not being a county borough (i) and not having separate quarter sessions (k) but where the mayor, aldermen and burgesses were on the 1st January 1893 the legally constituted local authority for the purpose of the statutes general or local, relating to weights and measures (l) is relieved from the expenses incurred by the county council in such matters. The relief takes the form of a yearly contribution from the county council amounting to the proportion contributed towards those expenses of the county council by the several parishes and parts of parishes within the borough and calculated according to the values stated in the basis for county rates (m) in force for the time being. If the receipts of the county council exceed its expenditure in respect of such matters a proportionate part of the excess is to be deducted from any sum due to such borough as a recoupment under the statutes relating to contagious diseases of animals (n) or the sale of food and drugs (o)

**Relief from  
expenses of  
Weights and  
Measures  
Act****Relief as to  
expenses of  
Diseases of  
Animals Act**

The council of every borough which is assessed to the county rate is entitled to receive from the council of the county the proportionate amount paid by the parishes and parts of parishes in such borough

apply and as to local inquiries see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(e) Local Government Act 1888 (51 & 52 Vict c 41) s 33 (7)

(f) *Ibid* s 38 (5) as to the transfer of powers from the borough council and justices to the county council see p 371 *post*. The obligation of paying the salary of the recorder, the clerk of the peace and the clerk of the borough justices remains on the corporation (*Thetford Corporation v Norfolk County Council* [1898] 2 Q B 468 C A overruling *Ex parte Kent County Council and Dover Council* *Ex parte Kent County Council and Sandwich Council* [1891] 1 Q B 389 and *Re Herefordshire County Council and Leominster Borough Council and Re Local Government Act 1888* [1895] 1 Q B 43)

(g) See p 300 *ante*

(h) Local Government Act 1888 (51 & 52 Vict c 41) s 38 (6). The adjustment was made under *ibid* s 62

(i) As to the financial relations of such boroughs see p 303 *ante*

(k) See title MAGISTRATES p 541 *post*

(l) See title WEIGHTS AND MEASURES

(m) As to this basis see p 359 *post*

(n) See title ANIMALS Vol I p 430 and the text *infra*

(o) Weights and Measures Act 1893 (56 & 57 Vict c 19) s 1 and see title FOOD AND DRUGS, Vol XV p 34. As to the similar relief from expenses relating to the sale of food and drugs see *ibid*

towards the expenses of the county council in the execution of the statutes relating to contagious diseases of animals (*p*)

The expenses incurred by the county council in controlling advertisements cannot be raised within a borough having according to the last census a population of over 10 000 inhabitants (*q*)

SECT 8  
The  
County  
—  
Expenses  
relating to  
advertisements

SUB SECT 6—Finance of the County Council

**758** The county council has all the powers of rating formerly possessed by the justices in quarter sessions, namely the making assessing and levying of the county rate (*r*) the police rate (*s*), the hundred rates (*a*) and all other rates (*b*)

Rating  
powers

At the beginning of every local financial year (*c*) an estimate of the receipts and expenses during that year must be submitted to the council, and the council must estimate the amount required to be raised in the first and in the second six months of the year by means of contributions. The estimate for the latter part of the year may at the end of the first six months be revised or altered according as the previous estimate is found to be greater or less than is actually needed (*d*)

The annual  
budget

Any property income debts liabilities and expenses of councils or authorities affected by any scheme order or matter done under the Local Government Act, 1888 (*e*) may be adjusted by the scheme or order itself (*f*), or by agreement (*g*) or failing that by arbitration (*h*). The adjustment of property income liabilities and expenses does not involve compensation for loss of rating area (*i*)

Financial  
adjustment.

(*p*) Diseases of Animals Act 1894 (*s* 1 & 58 Vict c 57) s 41. It would therefore appear that a borough is entitled to this repayment although the council of that borough is not the local authority for the execution of this Act. The local authority for the execution of this act in the case of a borough is the council of such a borough as had a population of not less than 10 000 in the census of 1881 (*ibid* s 3) see further title ANIMALS Vol I pp 429 430

(*q*) Advertisements Regulation Act 1907 (7 Fdw 7 c 27) ss 4 7. This also applies to urban districts of similar population (*ibid*)

(*r*) See p 359 *post*

(*s*) See titles POLICE RATES AND RATING

(*a*) See title RATES AND RATING

(*b*) Local Government Act 1888 (*s* 1 & 52 Vict c 41) s 3 (*i*)

(*c*) The local financial year is the twelve months ending 31st March (*ibid* s 73 (1)). All statutes relating to the accounts of local authorities their audit returns of receipts and expenditure and other matters are made applicable subject to the necessary adaptation by the Local Government Board (*ibid* s 73 (2))

(*d*) *Ibid* s 74

(*e*) 51 & 52 Vict c 41

(*f*) *Ibid* s 59 (4) (*e*)

(*g*) *Ibid* s 62 (1) see *Holsworthy Urban Council v Holsworthy Rural District Council* [1907] 2 Ch 62

(*h*) Local Government Act 1888 s 62 (2). As to arbitration see *ibid* s 62. *South Mimms Rural District Council v Barnet Urban District Council* (1900) 82 L T 421

(*i*) *Caterham Urban Council v Godstone Rural Council*, [1904] A C 171 overruling on this point *Re Rochdale Union and Haslingden Union* [1899] 1 Q B 640 O A. and *Re Buckinghamshire County Council and Hertfordshire County Council*, [1899] 1 Q B 515, *West Hartlepool Corporation v Durham County Council*, [1907] A C 246.



## SECT 8

SUB SECT 1—*The County Fund***The  
County**The county  
fund

Payments in

Payments out

**759** All the receipts of the county council for general or special county purposes are carried to the county fund, and all payments for such purposes are made in the first instance out of such fund (*k*)

Payments to (*l*) and payments out of, the county fund must be made to and by the treasurer. Unless made in pursuance of specific statutory requirements or of an order of a competent court payments out can only be made in pursuance of an order of the council signed by three members of the finance committee present at the meeting of the council and countersigned by the clerk of the council (*m*) but such an order for payment whether on account of capital or income cannot be made except on a resolution passed by the council on the recommendation of the finance committee after a notice of the meeting has been given stating the amount of the sum and the purpose for which it is to be paid save in the case of ordinary periodical payments for which no special notice is necessary (*n*). Such order may include several payments (*o*)

Cheques

Cheques issued in pursuance of an order require to be countersigned by the clerk or by a deputy approved by the council (*p*)

General  
county  
purposes and  
expenses

**760** General county purposes are all those which are declared by statute to be such and those for contributions to which the council is authorised to assess the whole area of its county (*q*). General expenses are the costs incurred for general county purposes and those incurred by the council in the execution of its duties which are not made special expenses (*r*)

Special  
county  
purposes and  
expenses

Special county purposes are those from contribution to which any portion of the county is exempt and any purposes where the expenditure involved is restricted by law to any limited part of the county. Special expenses are the costs incurred for special county purposes (*s*) or such as may be directed to be special expenses

Apportion  
ment

In determining the expenditure for any particular county purposes whether general or special a proper proportion of the officers' buildings and other establishment charges may be added to the expenditure (*t*)

Income

**761** The income of the county council is derived from its property in the form of rent royalties and tolls fees payable to the clerk of the peace of the county (*u*), fines imposed for breaches of byelaws and statutes contributions from the

(*l*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (1)

(*l*) *Ibid* s 80 (1) S 80 (*ibid*) is not applicable to county boroughs (*ibid* s 80 (*a*))

(*m*) *Ibid* As to the remedy by *certiorari* see *ibid* s 80 (2) and title CROWN PRACTICE Vol X pp 143 174

(*n*) Local Government Act 1888 (51 & 52 Vict c 41) s 80 (3) (4)

(*o*) *Ibid* s 80 (1)

(*p*) *Ibid*

(*q*) *Ibid* s 68 (2)

*Ibid*

*Ibid* s 68 (3) As to accounts see p 362 *post*

Local Government Act 1888 (51 & 52 Vict c 41) s 68 (8)

(*u*) See title MAGISTRATES p 625 *post*

SECT 8  
The  
County

national Exchequer (*b*) the share of customs and excise duties (*c*) county rates (*d*) contributions from county boroughs (*e*) money transferred from the Exchequer Contribution Account when forfeited by a borough otherwise entitled to it owing to the Secretary of State withholding a certificate of efficiency in respect of the borough police (*f*) fees and costs, payable to clerks of petty sessional divisions as are not excluded in the fixing of their salaries (*g*), and the county rate (*h*)

SUB SECT 8 —*The County Rate*

**762** The county rate (*h*) is the means by which contributions are raised when the general county account and the special county account of the county fund (*i*) are insufficient to meet the expenditure properly charged upon them respectively. Contributions for general expenses are assessed on all the parishes in the county while those for special expenses are assessed on such parishes in the county as are liable to be assessed to county contributions for those purposes (*j*). They are assessed in proportion to the annual value of such parishes as determined by the standard or basis for the county rate (*k*) and the enactments relating to this standard or basis and to the county rate itself are made applicable and extend to all parishes within any borough which are liable to be assessed to county contributions (*m*). Purpose

**763** The basis or standard for the county rate (*n*) is the means by which the county rate falls fairly and regularly upon the various parts of the county the basis being founded and prepared rateably and equally according to the full and fair annual value (*o*) of the BASIS OR  
STANDARD

(*b*) As to these see p 300 *ante* and as to their distribution see p 302 *ante*

(*c*) As to this see p 351 *ante*

(*d*) See the text *infra*

(*e*) See p 33 *ant*

(*f*) Local Government Act 1888 (51 & 52 Vict c 41) s 20 (2) see title POLICE

(*g*) Local Government Act 1888 (51 & 52 Vict c 41) s 84 (2) including such fees and costs in the case of the clerk to the justices of a non quarter sessions borough with a population either under or over 10 000 which has a separate commission of the peace (*Corrill County Council v Truro Town Council* (1894) 58 J P 294 but see *Letchford (Mayor) v Norfolk County Council*, [1898] 2 Q B 408)

(*h*) See further title RATES AND RATING

(*i*) See p 308 *ante*

(*k*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (4) (*o*)

(*l*) *Ibid* s 68 (6) see the text *infra*

(*m*) *Ibid* The operative statute is the County Rates Act 1802 (10 & 16 Vict c 81) as later appears but previously to the passing of this Act there had been another statute which although unrepealed is now obsolete namely the County Rates Act 1844 (7 & 8 Vict c 33) ss 1—6 (repealed so far as relating to county rates by the Statute Law Revision Act 1861 (24 & 25 Vict c 101)) which empowered the justices in quarter sessions to levy county rates or police rates see title POLICE. As to county rates in Lancashire see Local Government Act 1888 (51 & 52 Vict c 41) s 46 (5)

(*n*) The term county rate means and includes every rate assessed in a county or division of a county for all or any of the purposes to which the county rate or stock is or may be made liable (County Rates Act 1852 (16 & 17 Vict c 81) s 51)

(*o*) These words are to be taken to mean the net annual value of any property

**SECT 8**  
**The**  
**County**

**Making the**  
**rate**

property, of whatever kind, rateable to the relief of the poor in all parishes within the county (*p*)

**764** The county rate is made by the county council, whenever circumstances require it, by ordering and directing a fair and equal county rate to be made for any authorised purposes according to the basis or standard in force. For that purpose the council may assess and tax every parish within its jurisdiction rateably and equally, according to a certain pound rate to be fixed and publicly declared by it upon the said basis or standard (*q*)

**Retrospective**  
**rates**

The rate may include contributions in respect of the payment of costs incurred or which have become payable at any time within six months before the demand of the rates (*r*)

**Appeal**

A parish council where there is one (*s*) or in other cases the overseers of the poor or any inhabitant of the parish or place, may appeal against the rate (*s*) to the quarter sessions (*t*)

**Collection**

**765** The rate having been made a printed list of the parishes assessed and the amount of the rateable value upon which each parish has been respectively assessed must be sent by the county council to the overseers or those charged with the collection or levy of the rate in every parish within the county (*a*) but such printed lists need only be sent unless the county council otherwise directs when a new basis or standard or an alteration in the existing basis or standard has been allowed and confirmed (*b*)

**Issue of**  
**precepta.**

The county council then orders precepts in the prescribed form (*c*) or as near thereto as may be to be issued to the guardians of every union of parishes of which union any parish is situate within the county stating the sum assessed and charged for each rate on each parish in the union, the whole of which parish is situate within the county and to the guardians of every single parish within the county stating the sum assessed and charged on

as estimated for the purpose of assessing the poor rate (County Rates Act 1802 (10 & 16 Vict c 81) s 6) see as to this the Parochial Assessments Act 1836 (6 & 7 Will 4 c 96) s 1 and title RATES AND RATING

(*r*) As to the method of fixing the basis see the County Rates Act 1802 (15 & 16 Vict c 81) ss 1—20 Revenue Act 1863 (26 & 27 Vict c 33), s 22

(*q*) County Rates Act 1802 (15 & 16 Vict c 81) s 21 Tenants of lands in ancient demesne are liable to county rates notwithstanding their tenure (*R v Aylesford (Inhabitants)* (1860) 2 F & E 538) as to rating agricultural land see title RATES AND RATING

(*r*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (9) compare the provisions in the Public Health Act 1870 (38 & 39 Vict c 55) s 210 Without statutory sanction retrospective rates cannot be levied (*R v Read* (1849) 18 I J (M C) 164 *R v Bedlington Overseers* (1884) 48 J P 486) see further title RATES AND RATING

(*s*) County Rates Act 1802 (15 & 16 Vict c 81) s 22

(*t*) *Ibid* The right of hearing these appeals is expressly reserved to quarter sessions (Local Government Act 1888 (51 & 52 Vict c 41) s 8) For the grounds of procedure on appeal see the County Rates Act 1802 (15 & 16 Vict c 81) ss 22—20 *West Riding of Yorkshire County Council v Middleton Parish Council* [1906] 2 K B 157 *R v Blackawton (Inhabitants)* (1830) 10 B & C 792, and titles MAGISTRATES, p 638 post RATES AND RATING

(*a*) County Rates Act 1852 (15 & 16 Vict c 81) s 26

(*b*) County Rates Act, 1866 (29 & 30 Vict c 78) s 2

(*c*) County Rates Act, 1802 (15 & 16 Vict c 81), ss 26 39,

such parish for each rate, and requiring the guardians of the union or parish, within a time stated in the precepts to cause the aggregate of such sums to be paid out of the moneys held by them on behalf of each parish to the treasurer of the county (d) The precepts, which may be sent by registered post or otherwise (e) may include contributions for both general and special purposes, but the items must be separately stated (f)

SECT 8  
The  
County

#### SUB SECT 9—*Borrowing Powers*

**766** The powers of borrowing possessed by the county council, as in the case of other local authorities are confined to those which are authorised by statute and are in accordance with statutory restrictions (g) Temporary overdrafts at its bank can only be justified by the council on such grounds (h) even though the overdraft is not arranged on terms between the parties but takes the form of the bank cashing cheques drawn for purposes authorised by statute when there is no balance at the bank to meet them (i) The powers of borrowing cannot be delegated to a committee (j)

Borrowing  
powers

Loans are raised either as one loan or as several loans and either by the issue of stock or by debentures of not less than £5 or annuity certificates under the Local Loans Act 1875 (k) or by mortgage (l)

Raising of  
loans

(d) Under the earlier Act the high constables were required to pay the county rates which were collected into the hands of a treasurer or treasurers appointed by quarter sessions to receive them who in turn were required to pay over the moneys as directed by the justices (County Rates Act 1738 (12 Geo 2 c 29) s 6) As to guardians of the poor see title POOR LAW

(e) County Rates Act 1852 (15 & 16 Vict c 51) ss 26 39

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (6) As to obeying and enforcing the precept see *ibid* ss 21 26 27 39 and title RATES AND RATING

(g) See the Local Government Act 1888 (51 & 52 Vict c 41) s 69 County Councils Mortgages Act 1909 (9 Edw 7 c 38) s 1 Public Health Act 1875 (38 & 39 Vict c 55) ss 236 237 Development and Road Improvement Funds Act 1909 (9 Edw 7 c 47) s 8 Small Holdings and Allotments Act 1908 (8 Edw 7 c 36) s 52

(h) See *R v Reed (Sir Charles)* (1880) 5 Q B D 483 O A A G v *Tottenham Urban District Council* (1909) 73 J P 337 A G v *De Winton* [1906] 2 Ch. 106 and see further p 31 ante But as to the power of the Local Government Board to remit sums disallowed or surcharged see p 286 ante

(i) See *Cunliffe, Brooks & Co v Blackburn Benefit Society* (1884) 9 App Cas 857

(j) Local Government Act 1888 (51 & 52 Vict c 41) ss 28 (3) 31 (3)

(k) 38 & 39 Vict c 53

(l) Local Government Act 1888 (51 & 52 Vict c 41) s 69 (8) (10) as amended by the County Councils Mortgages Act, 1909 (9 Edw 7 c 39) s 1 The mortgages are made under the Public Health Act 1875 (38 & 39 Vict c 55) ss. 236 237 The Local Government Act 188 (51 & 52 Vict c 41) s 69 (9) limited the period for which a county council might borrow by way of mortgage to one not exceeding five years This provision is not only repealed but as to any money borrowed by way of mortgage before 25th November 1909 is to be deemed not to have been in force (County Councils Mortgages Act 1909 (9 Edw 7, c 38) s 1) As to loss from forged transfers of stock etc, see title COMPANIES, Vol. V, pp 185 et seq

**SECT. 8.**  
**The**  
**County**

County stock

Regulations of the Local Government Board confirmed by Order in Council (*m*) prescribe the manner in which county stock may be created issued, transferred, dealt with and redeemed (*n*) They may provide for the discharge of the loan so raised and, in the case of consolidation of debt for extending or varying the times of discharge They may also provide for the consent of limited owners for the application of the statutes relating to stamp duties and cheques and for the disposal of unclaimed dividends For any such purposes they may apply any enactments relating to kindred matters (*o*)

SUB SECT 10 — *Accounts and Audit*

The general  
accounts.

**767** The receipts and expenditure of the county are kept in three accounts — (1) the Exchequer Contribution Account (*p*), (2) the general county account and (3) the special county account and the council must keep such accounts as will prevent the whole county from being charged with expenditure which is properly payable by a portion only of the county and will prevent any sums raised in a portion only of the county being applied in reduction of expenditure payable by a larger part or the whole of the county, and will secure for a portion of the county exemption from contribution to which it is entitled and ensure that sums specifically applicable to particular purposes are applied to no other (*q*)

General  
county  
account

The general county account is the account of the county fund to which contributions for general county purposes (*r*) are carried and out of which general expenses are paid (*s*) When the moneys standing to the credit of this account are insufficient county contributions may be levied to meet the deficiency (*t*)

Special  
county  
account

The special county account is the account of the county fund to which contributions for special county purposes (*a*) are carried and out of which special expenses (*a*) are paid (*b*) Deficiencies are met by a levy of contributions on the parishes liable to be assessed for such purposes (*c*)

(*m*) The order can only be made if in the thirty days during which the regulations have been submitted to Parliament no resolution is passed against giving effect to the regulations (Local Government Act 1888 (51 & 52 Vict c 41) s 70 (3) (4))

(*n*) Local Government Act 1888 (51 & 52 Vict c 41) s 70 (1)

(*o*) *Ibid* s 70 (2) The enactments referred to are the Local Loans Acts and Acts relating to stock issued by the London County Council or the corporations of municipal boroughs

(*p*) See p 351 *ante*

(*q*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (7)

(*r*) See p 358 *ante*

(*s*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (2)

(*t*) *Ibid* s 68 (4) and see p 359 *ante*

(*a*) See p 358 *ante*

(*b*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (3) Separate accounts are required to be kept of the receipts and expenditure with respect to small holdings see title SMALL HOLDINGS AND SMALL DWELLINGS and see title ALLOTMENTS Vol I p 359

(*c*) Local Government Act 1888 (51 & 52 Vict c 41) s 68 (5) see p 359 *ante*

**768** The accounts of receipts and expenditure must be made up to the end of the local financial year, that is, for the twelve months ending the 31st March (*d*) in the form prescribed by the Local Government Board (*e*)

SECT 8  
The  
County

Making up  
accounts  
Returns to  
Local Govern-  
ment Board

The statutory provisions which relate to the returns to the Local Government Board of the accounts of a borough to the accounts of the borough treasurer and to the inspection and abstract of such accounts apply also to the accounts of the county council their treasurer and officers and the provisions relating to the returns to the Local Government Board extend to the return of a printed copy of the abstract of such accounts (*f*)

**769** The accounts of the county council the treasurer and officers are audited by the district auditors of the Local Government Board in the same way as the accounts of an urban district council and their officers are audited (*g*) subject to a modification in the scale of contribution towards the remuneration and expenses of the auditors (*h*) and ratepayers and owners of property in the county have similar rights and may appeal as in the case of such audit (*i*)

Audit

#### SUB SECT 11—*Land and Property*

##### (1) *in General*

**770** With certain exceptions (*h*) all property formerly vested in quarter sessions or in any justice or county officer for county purposes is vested in the county council (*i*)

Transfer

(*d*) Local Government Act 1888 (51 & 52 Vict c 41) s 73 (1)

(*e*) *Ibid* s 71 (1)

(*f*) *Ibid* s 71 (2) The statutory provisions referred to are those of the Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 26—28 233 as to which see pp 323 324 *ante*

(*g*) Local Government Act 1888 (51 & 52 Vict c 41) s 71 (3) The Public Health Act 1875 (38 & 39 Vict c 55) ss 247 250 apply and all enactments applying to audit by district auditors (Local Government Act 1888 (51 & 52 Vict 41) s 71 (3)) As to these and such audit generally see p 284 *ante*

(*h*) Local Government Act 1888 (51 & 52 Vict c 41) s 71 (3) In the case of the accounts of urban district councils the scale of contribution provides for a stamp duty of £50 where the total expenditure comprised in the financial statement is £100 000 or upwards The modification referred to provides for a stamp duty of £50 where the total expenditure exceeds £100 000 and is less than £150 000 £60 when the latter sum and less than £200 000 and £15 in addition for every £50 000 or part thereof beyond (Local Government Act 1888 (51 & 52 Vict c 41) s 71 (3) Sched II)

(*i*) *Ibid* s 71 (3) As to these rights and as to appeal see pp 285 286 *ante*

(*k*) The exceptions are the existing records of or in the custody of the quarter sessions (see title MAGISTRATES p 624 *post*) property belonging to a charity for which the trustees and managers are to be appointed as formerly until the Charity Commissioners otherwise direct and property claimed by the justices as being theirs by presentation or by purchase out of their own funds and not being property held for the purposes of the county (Local Government Act 1888 (51 & 52 Vict c 41) s 64 (1) (a) (b) (c))

(*l*) *Ibid* s 64 see *ibid* for powers of management etc Where the only remedy against the justices to be recouped payments was by

## SECT. 6.

**The  
County**Acquisition  
of property

For the purpose of its powers and duties including those executed through a standing committee, the county council may acquire, purchase, take on lease, or exchange any lands, or easements or rights over lands whether within or outside the county, and may also acquire hire erect and furnish any necessary halls buildings and offices whether within or without the county (*m*)

Sale and  
leasing of  
land

Land may be sold with the consent of the Local Government Board. The proceeds must be applied towards the discharge of any loan in any manner sanctioned by the Board or in any other way in which capital is applicable (*n*). The county council may, with such consent let for any term any lands which it may possess as and when it can conveniently spare the same (*o*) and with the like consent lease land for a term not exceeding twenty one years for military purposes (*p*)

(11) *Special Properties*Shire and  
county halls  
assize courts  
judges  
lodgings etc

**771** The administrative business of the justices in quarter sessions in respect of shire and county halls assize courts judges lodgings, lock up houses court houses justices rooms, police stations county buildings, works and property is now in the hands of the county council (*q*) and all such buildings are now vested in the county council (*r*) subject to the right of the justices in quarter sessions or out of session to use the same (*s*) for which last mentioned purpose the standing joint committee (*a*) have complete control over and can direct the expenditure of the funds which the

mandamus it was held that the county council could not be sued in an action to recover such moneys (*Salford Corporation v Lancashire County Council* (1890) 25 Q B D 384 C A *Boote cum Linacre Corporation v Lancashire County Council* (1890) 60 L J (Q B) 323 C A)

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 65 (1) For the purpose of purchase lease and exchange the Public Health Act 1875 (38 & 39 Vict c 55) ss 176—178 are made applicable (Local Government Act 1888 (51 & 52 Vict c 41) s 65 (2)) As to the rating of county buildings see title RATES AND RATING As to the application of the Mortmain Acts see title CHARITIES Vol IV pp 132 137 138 As to the transfer of scientific and other institutions see title LITERARY AND SCIENTIFIC INSTITUTIONS p 203 *ante*

(*n*) Local Government Act 1888 (51 & 52 Vict c 41) s 65 (3)

(*o*) Public Health Act 1875 (38 & 39 Vict c 55) s 177 incorporated with and by the Local Government Act 1888 (51 & 52 Vict c 41) s 65 (2)

(*p*) Military Lands Act 1892 (55 & 56 Vict c 43) s 11 The lease terminates if the land ceases to be used for such purposes (*ibid* s 11 (2)) see title ROYAL FORCES As to allowing a public building to be used as a county court see title COUNTY COURTS Vol VIII p 414

(*q*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (iv) and see title POLICE The right which the justices in quarter sessions had acquired by agreement with a private individual to use his room free of charge for quarter sessions purposes was held not to have been transferred under this provision (*Montgomeryshire County Council v Pryce Jones* (1892) 57 J P 308 C A)

(*r*) Local Government Act 1888 (51 & 52 Vict c 41) s 64 (1)

(*s*) *Ibid* s 64 (3) see p 369 *post* and title MAGISTRATES

(*a*) See p 349, *ante*

county council must find the means of raising (b) Both the county council and the joint committee may issue regulations for managing the buildings so long as the regulations do not conflict (c)

SECT 8  
The  
County

The county council must see that proper provision is made for a shire hall, county hall, or other building for holding the assizes or the grand or other sessions of the peace, and for lodgings for the judges attending the assizes (d)

Duty to  
provide  
accommo-  
dation for  
assizes and  
sessions  
Duty to  
repair same.

The duty of the county council to effect repairs of the above mentioned buildings does not relieve any persons or districts from liability by custom to repair and finish such buildings and in such cases the money spent by the council in such repairs and maintenance is assessed and rated on such persons and districts, and not on the whole county (e)

#### SECT 9—Meetings of Owners and Ratepayers under Public Health Acts

**772** Meetings of owners (f) and ratepayers are sometimes, though rarely required to determine questions (g) They are summoned on a requisition of twenty ratepayers and owners or twenty ratepayers or owners resident in the district or place (h) by the mayor or chairman of the urban district council as the case may be, or in rural districts by the churchwardens or overseers or if none of these by a person appointed by the Local Government Board (i) Notices of the meeting are advertised in the local newspapers and affixed to the principal doors of the churches and chapels (k)

How  
summoned

The chairman is the person summoning the meeting or failing him someone elected by the meeting (l) He puts the resolution (m)

(b) *Re Somerset County Council* (1889) 54 J P 182

(c) *Ibid*

(d) See the County Buildings Act 1826 (7 Geo 4 c 63) ss 3—5 8 9 County Buildings Act 1837 (7 Will 4 & 1 Vict c 24) ss 1—3 County Buildings Act 1847 (10 & 11 Vict c 28) s 1 Judges Lodgings Act 1839 (2 & 3 Vict c 69) s 1 and as to assizes see title CRIMINAL LAW AND PROCEDURE Vol IX p 72 As to the assize courts etc at Manchester see Manchester Assize Courts Act 1858 (21 & 22 Vict c xxiv) Local Government Act 1888 (51 & 52 Vict c 41) s 47

(e) County Buildings Act 1826 (7 Geo 4 c 63) s 13 As to the transferred duties and liabilities with regard to bridges see generally title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 184—189

(f) For definition see Public Health Act 1875 (38 & 39 Vict c 55) s 4 and title PUBLIC HEALTH AND LOCAL ADMINISTRATION compare titles BURIAL AND CREMATION Vol III p 410 HIGHWAYS STREETS AND BRIDGES, Vol XVI p 113 note (a)

(g) *E.g.* under the following sections of the Public Health Act 1875 (38 & 39 Vict c 55) —s 166 (provision of markets by urban authorities see title MARKETS AND FAIRS) s 216 (as to highway parishes in urban districts see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 126) s 272 (constitution of a local government district see p 334 *ante*) and under the Highway Rate Assessment and Expenditure Act 1882 (45 & 46 Vict c 27) s 9

(h) Public Health Act 1875 (38 & 39 Vict c 55) Sched III (1)

(i) *Ibid* Sched III (2) Security for payment of costs incurred in relation to such meeting must be given (*ibid*, Sched III (3))

(k) *Ibid*, Sched III (4)

(l) *Ibid* Sched III (5)

(m) *Ibid*, Sched III (6).



## SECT 9

Meetings  
of Owners  
and Rate  
payers etcPoll and  
voting

and if the majority of the meeting consent he can adjourn the meeting from time to time (n) The declaration of the chairman in the absence of proof to the contrary is sufficient evidence of the decision of the meeting (o)

A poll may be demanded on the resolution by any owner or rate payer In this case the poll is taken by means of voting papers in the prescribed form (p) The polling takes place under the same terms and conditions as formerly prevailed in the election of local boards (a) Owners and ratepayers are given a number of votes in proportion to their rating the former being also able to vote in respect of their ownership and occupation of the same property and either personally or by proxy (b) Members of corporations or bodies of persons cannot vote individually as owners of the property of the corporation or body but partners in a firm consisting of not more than six persons may vote as if the property were divided equally among them (c) Where there is no register of owners and proxies an owner or proxy is entitled to a voting paper on making a proper claim (d)

## Election

The person who has summoned the meeting is the returning officer (e) and he gives the necessary notice of the election He may issue a list of voters and has power to inspect and take copies of parish books and documents (f) He secures the delivery of the voting papers at the addresses of the voters three days at least before the day appointed for their collection (g) The only voting papers recognised are those which have been delivered and subsequently collected on the authority of the returning officer but provision is made for failure to deliver or collect (h) Having collected the voting papers he must forthwith determine the result signing and certifying it and delivering it to the council to be deposited at its office open to inspection (i)

(n) Public Health Act 1875 (38 & 39 Vict c 55) Sched III (5)

(o) *Ibid* Sched III (6)

(p) *Ibid* Sched IV Form O

(a) *Ibid* Sched III (6) The rules relating to the election of local boards are contained in Sched II (8)—(17) (20) (21) (36)—(38) (44)—(49) (51)—(54) (66) (68) (69) subject to the modifications effected by Sched III (6) Sched II was repealed by the Local Government Act 1894 (56 & 57 Vict c 73) and it only exists to the extent stated for the purpose of such polling

(b) Public Health Act 1875 (38 & 39 Vict c 55) Sched II (12)—(14) As to the number of votes given in a district divided into wards see *ibid* Sched II (8) (9) As to the special definitions of owner and ratepayer for these purposes see *ibid* Sched II (10) (11) respectively As to the proxies to be used see *ibid* Sched II (15) Sched IV Form M As to a claim to be registered as an owner or proxy see *ibid* Sched II (20) (21) Sched IV Form I

(c) *Ibid* Sched II (16) (17)

(d) *Ibid* Sched III (6) adopting Sched II (20) (21)

(e) *Ibid* Sched III (6)

(f) *Ibid* Sched II (36)—(38)

(g) *Ibid* Sched II (44) (45)—(47) relating to the filling up of the voting papers Penalties may be inflicted on the returning officer for default in his duties (*ibid* Sched II (68)) and on persons guilty of offences in the election (*ibid* Sched II (69))

(h) *Ibid* Sched II (48) (49)

(i) *Ibid* Sched II (51), (53) (54)

When passed a copy of the resolution must be forwarded by the summoning officer to the Local Government Board, advertised in the local papers and affixed to the churches and chapels (k)

When the resolution results in the constitution of a local government district the costs of the meeting and poll are payable out of the general district rates in urban districts the same costs are payable out of the fund or rate applicable to the general purposes of the Public Health Acts (l)

SECT 9  
Meetings  
of Owners  
and Rate  
payers etc

Publication  
of resolution  
when passed.  
Costs

## SECT 10—Powers Duties and Liabilities of the County Council

### SUB SECT 1—Transferred Powers Duties and Liabilities

#### (1) In General

**773** Powers duties and liabilities of an administrative character have been or may be (m) transferred by provisional order from certain Government departments and various authorities to the county council and in some cases to joint committees of county councils (n) Enactments relating to transferred matters are to be

(k) Public Health Act 1875 (38 & 39 Vict c 55) Sched III (7)

(l) *Ibid* Sched III (8)

(m) See Local Government Act 1888 (51 & 52 Vict c 41) s 10 The provisional order must be confirmed by Act of Parliament (*ibid*)

(n) As to the determination of questions arising as to the extent of any transfer see *ibid* s 29 R S C 10th August 1892 (Yearly Practice of the Supreme Court 1912 pp 930 931) and the following cases—*Re Local Government Act 1888 Ex parte Staffordshire Quarter Sessions (Chairman)* (1889) 54 J P 72 (as to rates levied in a stipendiary district) *Re Somerset County Council* (1889) 54 J P 182 (difference between county council and standing joint committee as to the maintenance of buildings for assizes and sessions) *Re West Riding County Council* (1890) 54 J P 533 (as to the liability to make local grants for a period before 1st April 1889) *Re Staffordshire and Derbyshire County Councils* (1890) 54 J P 566 (as to liability under a local Act to repair a bridge in two counties) *Re Salop County Council* (1891) 56 J P 213 (as to liability under agreements to share the expense of a county lunatic asylum) *Re Warminster Local Board and Wilt County Council* (1890) 25 Q B D 450 (as to maintenance of main roads) *Re Local Government Act 1888 Ex parte Leicestershire County Council and County of Leicester Standing Joint Committee* [1891] 1 Q B 53 (as to the division of a county into police districts) *Ex parte Kent County Council and Dover Council Ex parte Kent County Council and Sandwich Council* [1891] 1 Q B 389 (as to expenses of quarter and borough sessions) *Montgomeryshire County Council v Pryce Jones* (1892) 57 J P 308 C A (as to transfer of agreement for use of private room for sessions) *Marlborough Town Council v Wilt County Council* (1894) 58 J P 213 (as to maintenance of main roads) *Cornwall County Council v Truro Town Council* (1894) 58 J P 299 (as to liability for salary of borough justices clerk) *Re Norfolk County Council v Bittering (Highway Surveyor)* (1894) 58 J P 497 (as to right to take gravel from a pit for repairs of main road) *Re Bedfordshire County Council and Bedford Urban Sanitary Authority* [1894] 2 Q B 786 (as to main roads when urban authority elects to maintain them) *Re Herefordshire County Council and Leominster Borough Town Council and Re Local Government Act 1888* [1895] 1 Q B 43 (as to fees payable to justices clerk in a borough having a separate commission of the peace and less than 10 000 inhabitants) *Re Cardigan County Council* (1890) 54 J P 468 *Ex parte Kent County Council and Dover Council Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q B 725, C A *Thetford Corporation v Norfolk County Council*, [1898] 2 Q B. 468, C A

**SECT 10**  
**Powers etc**  
**of the**  
**County**  
**Council**

Powers etc  
 transferred  
 from quarter  
 sessions  
 exercised by  
 county  
 council alone

**Finance**

construed with such modifications as may be necessary to carry the Local Government Act, 1888 (o) into effect (o)

(11) *Powers Duties and Liabilities transferred by the Local Government Act 1888*

**774** The county council alone exercises the administrative business of the county formerly exercised by the quarter sessions or their committees in the following matters (p) —

In matters of finance it makes assessments levies applies and expends the county (q) police (r) hundred (s) and all rates makes orders for payment out (t) of such rates or out of the county stock (a) or county fund (b) prepares and revises the basis or standard for the county rate (c) exercises the powers of borrowing (d) passes the accounts of and discharges the county treasurer (e) fixes the tables of fees to be taken by and the costs to be allowed to inspectors analysts and other county officers other than the clerk of the peace and the clerks to the justices (f) determines and pays the salaries of all officers whose remuneration is payable out of the county rates other than the clerk of the peace and the clerks to the justices (g) provides for and pays the salary of the county coroner and determines the fees allowances and disbursements to be paid by him (h) provides and pays compensation for damage done by riots (i) provides for the expenses incurred in the execution of the Acts under which the county council is the authority in place of the

(o) 51 & 52 Vict c 41 s 78 A county council cannot perform any judicial business (*ibid*) No transfer affects the jurisdiction of quarter sessions and justices as to rating appeals (*ibid* s 8) see titles **MAGISTRATES** p 638 *post* **RATES AND RATING**

(p) The transfer is subject to existing powers duties and liabilities (Local Government Act 1888 (51 & 52 Vict c 41) s 28 (1))

(q) See p 359 *ante*

(r) As to management of the police see title **POLICE**

(s) See title **RATES AND RATING**

(t) See p 358 *ante*

(a) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (1) see p 362 *ante*

(b) See p 358 *post*

(c) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (1) These provisions are not applicable to county boroughs (*ibid* s 34 (3)) As to the basis or standard for the county rate see p 359 *ante*

(d) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (1) see p 361 *ante*

(e) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (iii) see p 346 *ante*

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (ix) As to county officers generally see p 342 *ante* and as to the clerk of the peace see p 343 *ante* and as to justices clerks see title **MAGISTRATES** pp 611 *et seq post* The county council does not determine although it pays the salaries of these clerks The provisions as to county officers do not apply to county boroughs (Local Government Act 1888 (51 & 52 Vict c 41) s 34 (3))

(g) *Ibid* s 3 (x) see note (f) *supra*

(h) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xi) This provision does not apply to county boroughs (*ibid* s 34 (3)) See also title **CORONERS**, Vol VIII p 222 and see especially *ibid* pp 217, 218 and as to special divisions of counties *ibid* pp 214—221

(i) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xii) The liability thus transferred is imposed by the Riot (Damages) Act, 1830 (40 & 50 Vict c 38)

quarter sessions (*k*), and provides and pays the costs of matters in connection with the registration of parliamentary voters (*l*)

In matters relating to county property and institutions the county council, as successor to the quarter sessions deals with shire halls and the other property already specified (*m*), the provision and maintenance of asylums for pauper lunatics (*n*) county bridges and their approaches (*o*)

In connection with officers the county council appoints and removes the county treasurer (*p*), the county surveyor (*q*) the public analysts (*r*) any officer under the Explosives Act 1875 (*s*) and any officer whose remuneration is paid out of the county rate other than the clerk of the peace and the clerks to the justices (*t*) or the coroner (*u*)

The county council also exercises certain powers of dividing the county into coroners districts (*a*) and polling districts (*b*) and of appointing places of election and revision courts (*c*)

In matters of licensing the transferred powers of the justices are those of licensing under any general Act places for music and dancing and of granting certain racecourse licences (*d*)

The county council also exercises the powers and performs the

SECT 10  
Powers etc  
of the  
County  
Council

Property and  
institutions  
Officers.

Division of  
county

Licensing

Miscella-  
neous

(*l*) See the text *infra*

(*l*) See title ELECTIONS Vol XII p 246

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (iv) see further p 364 *ante* and also as to the obligation to make provision for the accommodation of the quarter sessions and justices see p 364 *ante* As to reformatory and industrial schools see title EDUCATION Vol XII pp 78 79

(*n*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (vi) see title LUNATICS AND PERSONS OF UNSOUND MIND pp 479 *et seq post* Any asylum provided in whole or in part at the cost of a county is included in the expression county lunatic asylum (Local Government Act 1888 (51 & 52 Vict c 41) s 86 (5))

(*o*) *Ibid* s 3 (viii) see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 184—189

(*p*) See p 344 *ante* This provision is not applicable to county boroughs (Local Government Act 1888 (51 & 52 Vict c 41) s 34 (3))

(*q*) See p 346 *ante*

(*r*) See p 347 *ante*

(*s*) 38 & 39 Vict c 17 The reference here is to the powers of the justices in quarter sessions under *ibid* s 75 see further title EXPLOSIVES Vol XIV pp 390 391

(*t*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (x) see note (*j*) p 368 *ante* As to the clerk of the peace see p 343 *ante* and as to clerks to the justices see title MAGISTRATES pp 611 *et seq post*

(*u*) See title CORONERS Vol VIII pp 215 234

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xi) This is not applicable to county boroughs (*ibid* s 34 (3)) see further title CORONERS Vol VIII p 214

(*b*) As to electoral divisions and polling districts see the Polling Districts (County Councils) Act 1908 (8 Edw 7 c 13) s 2

(*c*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xii) and see title ELECTIONS Vol XII pp 262 308

(*d*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (v) see, further, title THEATRES AND OTHER PLACES OF ENTERTAINMENT

The reference to racecourses is confined to the Racecourses Licensing Act, 1879 (42 & 43 Vict c 18), which affects only a radius of ten miles from Charing Cross, see, further, title GAMING AND WAGERING, Vol XV, pp 286, 287

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**Powers etc**  
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duties formerly vested in or imposed upon the quarter sessions as county authority under the Highways and Locomotives (Amendment) Act 1878 (*e*) as local authority under the Acts relating to contagious diseases of animals (*f*), destructive insects (*g*), fish conservancy (*h*) wild birds (*i*) weights and measures (*k*) gas meters (*l*), and stamps (*m*), also matters arising out of the Riot (Damages) Act, 1886 (*n*) the registration of the rules of scientific societies (*o*) the registration of charitable gifts (*p*) the certifying and recording of places of religious worship (*q*) the confirmation and record of the rules of loan societies (*r*)

**Powers**  
**etc trans-**  
**ferred from**  
**quarter**  
**sessions**  
**exercised**  
**by county**  
**council and**  
**quarter**  
**sessions**  
**jointly**

**775** Other powers which were formerly exercised only by the quarter sessions have been transferred to the jurisdiction of a standing joint committee representative of the county council and the justices of quarter sessions

Such powers are those relating to the control of the county police (*s*) the appointment and removal of the clerk of the peace (*t*) the fixing of the salaries of the justices clerks of petty sessions

(*c*) 41 & 42 Vict c 77 see title HIGHWAYS STREET AND BRIDGE Vol XVI pp 14 99 note (*t*)

(*f*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) see title ANIMALS Vol I pp 429 *et seq*

(*g*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) see title AGRICULTURE Vol I p 281

(*h*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) see title FISHERIES Vol XIV pp 622 *et seq*

(*i*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) see title ANIMALS Vol I pp 405 *et seq*

(*k*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) see title WEIGHTS AND MEASURES

(*l*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) This provision does not extend to county boroughs (*ibid*) see title GAS Vol XV p 344

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiii) The reference to stamps is to the Local Stamp Act 1869 (32 & 33 Vict c 49) which enabled the justices in quarter sessions to order that all fees and penalties payable to the treasurer should be paid and received by stamps when the clerks of petty and special sessions and justices within the county were paid by salary Questions arising as to the application of the Act are among the matters to be referred to and determined by the standing joint committee

(*n*) 49 & 50 Vict c 39 Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xiv)

(*o*) Under the Scientific Societies Act 1843 (6 & 7 Vict c 36) see title LITERARY AND SCIENTIFIC INSTITUTIONS p 207 *ante*

(*p*) Under the Charitable Donations Registration Act 1812 (52 Geo 3 c 102) see title CHARITIES Vol IV p 244

(*q*) Under the Places of Religious Worship Act 1812 (52 Geo 3 c 155) s 2 see title ECCLESIASTICAL LAW Vol XI p 817

(*r*) Loan Societies Act 1840 (3 & 4 Vict c 110) s 4 see Local Government Act 1888 (51 & 52 Vict c 41) s 3 (xv) and see title LOAN SOCIETIES p 219 *ante*

(*s*) Local Government Act 1888 (51 & 52 Vict c 41) ss 9 30 and see title POLICE This includes the control over the division of the county into police districts (*Ex parte Leicestershire County Council and County of Leicester Standing Joint Committee* [1891] 1 Q B 53)

(*t*) Local Government Act 1888 (51 & 52 Vict c 41) s 83, and p 343, *ante*

divisions in the county (a), to joint officers, to matters required to be determined jointly by the quarter sessions and the county council (b), to any matters arising with respect or incidental to the above mentioned police clerks or joint officers, or joint matters to the provision of accommodation for the quarter sessions or justices out of session or to the use by them of the police or clerks of any buildings rooms or premises (c) or to the application of the Local Stamp Act 1869 (d) to any sums received by clerks to justices (e) or to any matters required to be determined jointly by the quarter sessions and the county council (f)

SECT 10  
Powers etc  
of the  
County  
Council

**776** Beyond the administrative powers and business of the quarter sessions the county council takes by transfer from the justices of the county out of session the powers in respect of the licensing of places for stage plays (a) and their powers and duties in respect of the execution as local authority of the statute relating to explosives (h)

Powers etc  
transferred  
from justices

**777** The duties and liabilities of the inhabitants of the county are now the duties and liabilities of the county council (i) but such transfer does not create any new liabilities and any common law or statutory restrictions on the duties and liabilities formerly existing in the case of the inhabitants of the county continue in the hands of the county council (k)

Transfer  
of duties of  
inhabitants of  
county

**778** The powers duties and liabilities of the quarter sessions or justices which in the case of the county are transferred to the county council are also transferred to the council of a county borough in so far as that council was not already possessed of

Exercise of  
transferred  
powers in  
boroughs  
and county  
boroughs

(a) Local Government Act 1888 (51 & 52 Vict c 41) ss 30 84 (2) and see title MAGISTRATES pp 611 *et seq post* This applies to the clerks of county petty sessional divisions (*Cornwall County Council v Truro Town Council* (1894) 58 J P 299) but not to the clerks to the borough justices (*Thetford Corporation v Norfolk County Council* [1898] 2 Q B 468 C A overruling *Ex parte Kent County Council and Dover Council Ex parte Kent County Council and Sandwich Council* [1891] 1 Q B 389 and *Re Herefordshire County Council and Leominster Borough Town Council and Re Local Government Act 1888* [1895] 1 Q B 43)

(b) Local Government Act 1888 (51 & 52 Vict c 41) s 30 (1)

(c) *Ibid* s 30 (1) (3) The joint committee have complete control over and can direct the expenditure of the funds which the county council is under obligation to raise (*Re Somerset County Council* (1889) 54 J P 182)

(d) 32 & 33 Vict c 49 see note (m) p 370 *ante*

(e) See title MAGISTRATES p 613 *post*

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 30 (3)

(g) See title THEATRES AND OTHER PLACES OF ENTERTAINMENT

(h) Local Government Act 1888 (51 & 52 Vict c 41) s 7 see Explosives Act 1875 (38 & 39 Vict c 17) and title EXPLOSIVES Vol XIV p 360 As to the transfer of powers from borough councils and borough justices see the text *infra*

(i) Local Government Act 1888 (51 & 52 Vict c 41) s 79 (2)

(k) Compare *Salford Corporation v Lancashire County Council* (1890) 25 Q B D 384 C A and consider for example the liabilities for non repair of county bridges which are the same as formerly see title HIGHWAYS, STREETS AND BRIDGES Vol XVI p 188

**SECT 10**  
**Powers etc**  
**of the**  
**County**  
**Council**

them (*l*), whether they were formerly vested in or attached to the court of quarter sessions or justices of the borough or of the county in which the borough is situate (*m*). But the provisions of transfer relating to county officers the standing joint committee, coroners, gas meters and rates and the basis or standard for the county rate, have no application to county boroughs (*n*) nor has the council of the borough transferred to it any of the powers in relation to the division of the county into polling districts for parliamentary elections, the appointment of places of election for the county the revision courts and the costs of matters to be done for the registration of parliamentary voters for the county (*o*).

In other  
boroughs

**779** The position of other boroughs depends upon whether they are quarter sessions boroughs and if so whether they had in 1881 a population of 10 000 or less or whether they have been constituted quarter sessions boroughs since 1888 or whether they are boroughs with a separate commission of the peace (*p*).

In larger  
quarter  
sessions  
boroughs

**780** In quarter sessions boroughs not being county boroughs having in 1881 a population of 10 000 and upwards the council of the borough retains its formerly its powers as local authority under any Acts (*q*). Subject thereto and to certain provisions as to contributions (*r*) and highways (*s*) such boroughs form part of the county for administrative purposes (*t*).

In smaller  
quarter  
sessions  
boroughs

In boroughs which have a separate court of quarter sessions and a population according to the census of 1881 of less than 10 000 the county council has by transfer the powers duties and liabilities formerly possessed by the borough council and the borough justices relating to the provision and maintenance etc of asylums for pauper lunatics (*u*) and the former powers duties and liabilities of the borough council as regards coroners (*b*) and the appointment of analysts under the Acts relating to the sale of food and drugs (*c*),

(*l*) As to what are county boroughs see p 300 *ante*

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 34 (1) (*c*)

(*n*) *Ibid* s 34 (3) These matters have either no application to such boroughs *e.g.* county rates or are provided for by other statutes *e.g.* the borough officers are regulated by the Municipal Corporations Act 1882 (45 & 46 Vict c 50) see p 300 *ante* the purposes of the standing joint committee are met by the council or watch committee see pp 302 321 *ante* as to coroners see title CORONERS Vol VIII pp 218 225 as to gas meters see title GAS Vol XV p 344

(*o*) Local Government Act 1888 (51 & 52 Vict c 41) s 34 (6) As to the power of the borough council to divide the borough into polling districts for its own elections see title ELECTIONS Vol XII p 308

(*p*) See p 301 *ante* As to the effect of a subsequent grant of quarter sessions to a borough see p 373 *post*

(*q*) Local Government Act 1888 (51 & 52 Vict c 41) s 35 (1) and see also pp 301 348, 355 *ante*

(*r*) See p 373 *post*

(*s*) See Local Government Act 1888 (51 & 52 Vict c 41) and title HIGHWAYS, STREETS AND BRIDGES Vol XVI p 14

(*t*) Local Government Act 1888 (51 & 52 Vict c 41) s 35 (1)

(*u*) See title LUNATICS AND PERSONS OF UNSOUND MIND pp 479 *et seq.*, *post*

(*b*) See title CORONERS Vol VIII p 225

(*c*) See title FOOD AND DRUGS, Vol XV pp 6—8

under the Acts relating to reformatory and industrial schools (*d*) fish conservancy (*e*), explosives (*f*) and under the Highways and Locomotives (Amendment) Act, 1878 (*g*) For the above and all other administrative purposes of the county council, the area of the borough is included in the county and is subject to the authority of the county council (*h*), and its parishes are liable to be assessed to all county contributions (*i*) A transfer under the above provision includes the transfer of any agreement relating to the above matters which such a borough may have entered into with other authorities, and subject to the terms and conditions thereof (*k*)

SECT 10  
Powers etc  
of the  
County  
Council.

Boroughs whether with or without a separate court of quarter sessions which by the census of 1881 had a population less than 10,000 form part of the county for all matters relating to the police force (*l*) the appointment of analysts under the Acts relating to the sale of food and drugs (*m*) the execution of the Destructive Insects Act, 1877 (*n*) gas meters (*o*) weights and measures (*p*) and the execution of the Acts relating to explosives (*q*) but the borough council retains the powers of making regulations in respect of dairies and milkshops (*r*)

In smaller  
boroughs  
generally

**781** The area of a borough other than a county borough which has been granted a court of quarter sessions since the 13th August, 1888 is subject to the authority of the county council and its parishes are assessed to county contributions as they were before such grant and the mayor aldermen and burgesses or borough council take no further power, duties, or liabilities by the grant than are necessary for establishing and maintaining the court so granted (*s*)

In quarter  
sessions  
boroughs  
created since  
1888

(*d*) See title EDUCATION Vol XII p 73

(*e*) See title FISHERIES Vol XIV p 601

(*f*) See title EXPLOSIVES Vol XIV p 360

(*g*) 41 & 42 Vict c 77 Local Government Act 1888 (51 & 52 Vict c 41) s 38 (1), (2) see further title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 14 26 117

(*h*) And the county coroners (Local Government Act 1888 (51 & 52 Vict c 41) s 38 (5)) see title CORONERS Vol VIII p 225

(*i*) Local Government Act 1888 (51 & 52 Vict c 41) s 38 (5) see further as to the financial relations p 356 *ante*

(*j*) *Re Salop County Council* (1891) 56 J P 213 in which case an agreement had been made by three quarter sessions boroughs of less than 10 000 inhabitants with two counties and a borough in one of them to share the expenses of a county lunatic asylum

(*k*) See title POLICE

(*m*) See title FOOD AND DRUGS Vol XV p 68

(*n*) 40 & 41 Vict c 68 and see title AGRICULTURE Vol I p 280

(*o*) See title GAS Vol XV p 344

(*p*) See title WEIGHTS AND MEASURES

(*q*) Local Government Act 1888 (51 & 52 Vict c 41) s 39 (1) (3) see title EXPLOSIVES Vol XIV p 360

(*r*) Local Government Act 1888 (51 & 52 Vict c 41) s 39 (2) The regulations are made under the Contagious Diseases (Animals) Act 1878 (41 & 42 Vict c 74) s 34 as amended by the Contagious Diseases (Animals) Act 1886 (49 & 50 Vict c 32) s 9 In all other respects these Acts were repealed by the Diseases of Animals Act 1894 (57 & 58 Vict c 57) Sched V, and under *ibid* s 3, the county council is the local authority in boroughs to which the Local Government Act 1888 (51 & 52 Vict c 41) s 39, refers see, further, title ANIMALS, Vol I, pp 429 *et seq*

(*s*) Local Government Act, 1888 (51 & 52 Vict c 41), s 37



**SECT 16**  
**Powers etc**  
**of the**  
**County**  
**Council**

In boroughs  
 with separate  
 commission of  
 peace

**782** In a borough whether a quarter sessions borough or not, having a separate commission of the peace and not being a county borough, all the powers, duties and liabilities of the court of quarter sessions or justices of the borough, which, in the case of the counties, are transferred to the county council are exercised within the borough by the county council with the exception of those relating to pauper lunatics. These are reserved for the borough council unless the borough is one of the smaller quarter sessions boroughs (*t*) in which case the county council exercises these powers also (*a*)

**SUB SECT 2—Conferred Powers Duties and Liabilities**

Areas of  
 local govern-  
 ment

**783** County councils may make representations to the Local Government Board as to the boundaries of a county or borough, the union of county boroughs and counties the union of counties or boroughs or the division of a county the constitution of county boroughs the alteration of county electoral divisions or of the number of county councillors and electoral divisions or the alteration of areas of local government partly situate in the county (*b*)

Bills in  
 Parliament  
 and legal  
 proceedings

County councils have the same powers of promoting and opposing bills in Parliament and of prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the county as are possessed by borough councils (*c*), except that in the case of the county council the consent of owners and ratepayers is not necessary (*d*)

County  
 councils  
 association

For the purpose of consultation as to their interests in common with other county councils and for the discussion of matters of local government, county councils are authorised to make contributions to an association formed for these purposes (*e*)

Emigration  
 and  
 colonisation

County councils may advance money to persons or bodies of persons whether corporate or unincorporate to aid in the emigration or colonisation of inhabitants of the county with a guarantee for repayment of such advances from any local authority in the county, or the Government of any colony (*f*)

Local  
 inquiries

**784** County councils have power to hold local inquiries (*g*) as to

(*t*) See p 372 *ante*

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 36

(*b*) *Ibid* s 54 see the Polling Arrangements (Parliamentary Boroughs) Act 1908 (8 Edw 7 c 14) s 2

(*c*) Under the Borough Funds Act 1872 (35 & 36 Vict c 91) (see p 380 *post*) and the Railway and Canal Traffic (Provisional Orders) Amendment Act 1891 (54 & 55 Vict c 12) s 1

(*d*) Local Government Act 1888 (51 & 52 Vict c 41) s 15 extended to the promotion of Bills by the County Councils (Bills in Parliament) Act 1903 (3 Edw 7 c 9) s 1 (1) (5) which also deals with expenses and appeals (*ibid* s 1 (2) (3)) and see generally title PARLIAMENT

(*e*) See County Councils Association Expenses Act 1890 (53 & 54 Vict c 3) s 1

(*f*) Local Government Act 1888 (51 & 52 Vict c 41) s 69 (1) (*d*)

(*g*) The county council cannot charge on the parish or district the remuneration of a barrister appointed by the county council to hold the inquiry (*Middlesex County Council v Kingsbury Urban Council* [1909] 1 K B 554 C A.) As to the power of county councils to contribute to the expenses of inquiries by the Charity Commissioners, see title CHARITIES, Vol. IV, p 357

the advisability of altering local government areas in their districts (*h*) as to the establishment of isolation hospitals (*i*), as to the compulsory acquisition of land by a parish council (*k*)

Other powers and duties are conferred or imposed upon county councils by a large number of statutes (*l*)

SECT 10  
Powers etc.  
of the  
County  
Council

**SUB SECT 3—Power to compel Performance of Duties by other Councils**

**785** Upon receiving a complaint from a parish council (*m*) that the district council has neglected its duties under the Public Health Acts (*n*) in respect of providing the parish with sewers or of maintaining sewers or of supplying the parish with water or in respect of maintaining and repairing highways the county council may after inquiry either resolve that the duties and powers of the district council for the purpose of the matter complained of shall be transferred to the county council or may make such an order as is mentioned in the Public Health Act 1875 (*o*) s 299 and may appoint a person to perform the duty mentioned in the order (*p*)

As to  
sewers water  
and high  
ways

A copy of every report which is required by the regulations of the Local Government Board to be sent to the Board by the medical officers of urban and rural district councils is also required to be sent to the council of the county within which such district lies (*q*) and if it appears from such report that the Public Health Act 1875 (*r*) has not been properly put in force within any district and that some matter of public health in the district requires remedy the county council may represent the case to the Local Government Board (*a*)

Procedure

**786** On the complaint by the parish council or in some case the parish meeting as to the failure of the district council in certain cases to protect public rights of way or roadside wastes

As to  
rights of way  
and roadside  
wastes

(*h*) See Local Government Act 1894 (56 & 57 Vict c 73) s 72

(*i*) Isolation Hospitals Act 1893 (56 & 57 Vict c 68) ss 6 7 see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*k*) Local Government Act 1894 (56 & 57 Vict c 73) s 9 see title (COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 9 167 *et seq*)

(*l*) See titles referred to in the list of cross references at pp 233—236 *ante* As to powers to compel performance of duties by other councils see the text *infra*

(*m*) See p 249 *ante* As to the right of the parish meeting to make the complaint see p 259 *ante*

(*n*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*o*) 38 & 39 Vict c 55 s 299 and see titles HIGHWAYS STREETS AND BRIDGES Vol XVI pp 150 151 PUBLIC HEALTH AND LOCAL ADMINISTRATION SEWERS AND DRAINS WATER SUPPLY and as to notice of the resolution see note (*c*) p 376 *post*

(*p*) Local Government Act 1894 (56 & 57 Vict c 73) s 16 (1) (2) When the order is made the Public Health Act 1875 (38 & 39 Vict c 55) ss 299—302 apply (Local Government Act 1894 (56 & 57 Vict c 73) s 16 (2))

(*q*) *Ibid* s 19 (1) As to the consequences of not sending such copy see note (*m*) p 277 *ante*

(*r*) 38 & 39 Vict c 55

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 19 (2) The Board may hold a local inquiry (*ibid* s 87 (1)) As to this see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

Part 10  
Transfer of  
powers to  
County  
Council

Joint  
committees

the county council may transfer to itself the powers and duties of the district council (b)

**787** If the rural district is in two or more counties the complaint is made by the parish council to the county council in whose district the parish is situate. When the subject matter affects more than one county the complaint is referred to a joint committee of their councils and if any members of the joint committee are not appointed those who have been appointed are to act. Questions relating to the constitution of joint committees are settled by the Local Government Board (c)

As to  
closing or  
demolition  
orders

**788** The county council has power to compel rural district councils in its area to perform their duties in respect of the housing of the working classes. In the case of unhealthy or obstructive buildings against which a rural district council has failed to proceed by making and enforcing a closing or demolition order the council of the county in which such district lies may give written notice to the district council that such proceedings ought to be adopted. In the event of continued failure of the district council the county council may by resolution declare the district council to be in default, and thereupon the powers of the district council in such matter except the power of making a scheme of reconstruction are vested in the county council but at the expense of the defaulting district council (d)

As to  
provision for  
housing

Similarly where a rural district council has failed in a proper case to make provision for the housing of the working classes the county council upon complaint by a parish council or parish meeting or by four inhabitant householders of the rural district and after holding a local inquiry may resolve that the powers of the rural district council in respect of which it is in default be transferred to them (e)

(b) See the Local Government Act 1894 (56 & 57 Vict s 73) s 26 (4). As to the right of the parish meeting to make complaint see pp 249 259 *ante*

(c) Local Government Act 1894 (56 & 57 Vict c 73) s 63 (2) and see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 29 30 150 151 162 163. In the above cases of the powers of the district council being transferred by resolution to the county council (see p 375 *ante*) notice of the resolution must be sent forthwith to the district council and the Local Government Board. The expenses incurred by the county council are a debt from the district council payable as part of its expenses in the execution of the Public Health Acts and they may be raised in like manner. The county council may borrow for the purposes in exactly the same way as the district council might have done (see p 337 *ante*) and may charge the fund or rate with the payment of principal and interest of the loan and the loan with interest must be paid and the charge has the same effect as if the loan were lawfully raised and charged on the fund or rate by the district council (see p 337 *ante*). Separate accounts must be kept by the county council. The county council may by order vest all or any of its powers, duties, property, debts and liabilities in relation to any of the transferred powers in the district council (Local Government Act, 1894 (56 & 57 Vict c 73), s 63 (1)).

(d) Housing of the Working Classes Act 1890 (53 & 54 Vict c 70), s 45 (2) see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(e) Housing Town Planning etc Act 1909 (9 Edw. 7, c 44) s 12. In such case the Local Government Act, 1894 (56 & 57 Vict c 73) s 63,

## PART I.—LOCAL GOVERNMENT AREAS AND THEIR GOVERNMENT

As an alternative to the above courses the county council may represent the matter by way of complaint to the Local Government Board and the Board may, amongst other remedial measures, order the county council to execute the necessary works or things (f)

SECT 10  
Powers etc.  
of the  
County  
Council.

SUB SECT 4.—Powers of County Councils to adjust Local Government Areas over County Districts and Parishes

**789** The county council has power to make the following alterations in respect of a county district i.e. the district of an urban or rural council not being a borough (g) or in respect of a parish (h), namely the alteration or definition of the boundary the division of districts or parishes the union of districts or parishes with others the transfer of part of a parish to another, the conversion of a rural district, or part, into an urban district the conversion of an urban into a rural district the transfer of the whole or part of a district to another the formation of new urban or rural districts (i), the division of an urban district into wards the alteration of the number or boundaries of wards, the alteration of the number of members of a district council and the apportionment of the members among the wards

Powers over  
county  
districts and  
parishes.

If the areas are situate in two or more counties, or their alteration will affect the boundaries of a poor law union situate in two or more counties the powers are exercised by a joint committee of the county councils interested (k)

Joint  
committee.

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applies as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(f) Housing Town Planning etc Act 1909 (9 Edw 7 c 44) s 10 (1) (3)

(g) Local Government Act 1888 (51 & 52 Vict c 41) s 100

(h) This power does not in any way affect the powers of the Local Government Board in respect of the union division or alteration of parishes (*ibid* s 57 (7) see p 238 *ante*). But in practice it supersedes if it does not destroy the power conferred by the Public Health Act 1875 (38 & 39 Vict c 55) ss 270—275 upon the Local Government Board of altering the area of local government districts. As to further powers with regard to parishes see p 379 *post*. As to the adjustment of property income debts liabilities and expenses which are affected by any such order of a county council see the Local Government Act 1894 (56 & 57 Vict c 73) s 68 as to local inquiries by a county council see p 374 *ante*.

(i) An urban district thus created has the same position as if created under the Public Health Act 1875 (38 & 39 Vict c 55) (*R v Barnes ex parte Batecliff* (1896) 13 T L R 25) but the extension of a district by such an order does not give to the urban authority whose district is extended the power of supplying the extended portion with water except under the conditions imposed by the Public Health Act 1875 (38 & 39 Vict c 55) s 52 and it is doubtful whether the Local Government Board can in its order confer such a power upon the urban authority as would interfere with the rights of other persons under the Public Health Act 1875 (38 & 39 Vict c 55) s 52 (*Huddersfield Corporation v Ravensthorpe Urban Council* [1897] 2 Ch 121 C A) and see title WATER SUPPLY

(k) Local Government Act 1894 (56 & 57 Vict c 73) ss 36 42. As to procedure etc see also Local Government Act 1888 (51 & 52 Vict c 41), ss 57 59 60 87, Order of the Local Government Board, 14th September, 1889

**SECT 10**  
**Powers etc**  
**of the**  
**County**  
**Council**

Fixing and  
altering  
number of  
guardians or  
councillors  
Regulating  
retirement

Joint  
committees

Miscel  
laneous  
in rural  
districts

in urban  
districts

**SUB SECT 5—Powers of County Council to control Government of County**  
**Districts Rural Districts and Unions**

**790** The county council may by order fix or alter the number of guardians or rural district councillors to be elected for each parish in its county and for this purpose may exercise powers similar to those vested in the Local Government Board (l) of adding parishes to each other and dividing parishes into wards (m)

The county council may also in order to regulate the retirement of guardians or rural district councillors in cases where they retire by thirds and to secure that as nearly as possible one third of such guardians and councillors shall retire in each year direct in which year or years of each triennial period the guardians or councillors for each parish ward or other area shall retire (n)

If the poor law union is situated in more than one county the above powers must be exercised by a joint committee of the county councils concerned (o)

**791** The county council may also direct the name which a rural district shall bear (p) may apply to the Local Government Board that urban powers shall be conferred on rural district councils (q) may assist in preserving rights of common (r) may take steps on the default of the rural district council in certain matters (s), and may make such orders as may be necessary for the proper constitution of the rural district council (t)

The county council may also take steps for the proper constitution of the urban district council (u)

(l) Under the Poor Law Amendment Act 1868 (31 & 32 Vict c 122) s 6 and see title POOR LAW

(m) Local Government Act 1894 (56 & 57 Vict c 73) s 60 (1) If guardians are elected under any local or personal Act for districts by whatever name called this and the other provisions of *ibid* s 60 apply to that district (*ibid* s 60 (4))

(n) *Ibid* s 60 (2) See also the power of the county council to order simultaneous retirement of guardians and rural district councillors *ibid* ss 20 (6) (a) 24 (4) and for a similar power in respect of urban district councillors *ibid* s 23 (b) and see title ELECTIONS Vol XII p 362

(o) See Local Government Act 1894 (56 & 57 Vict c 73) s 60 (3)

(p) Local Government Act 1894 (56 & 57 Vict c 73) s 24 (7) see p 329 *ante*

(q) Local Government Act 1894 (56 & 57 Vict c 73) s 25 (7) see p 332 *ante*

(r) Local Government Act 1894 (56 & 57 Vict c 73) s 26 (2) see title COMMONS AND RIGHTS OF COMMON Vol IV pp 600 601

(s) As to obstruction of rights of way see p 375 *ante* and as to default respecting the housing of the working classes see p 376 *ante*

(t) Local Government (Elections) Act 1896 (59 & 60 Vict c 1) s 1 By *ibid* s 2 the Act was to expire in 1897 unless continued. It has been continued each year since and is still in operation. By *ibid* s 1 (j) the council may delegate the exercise of its powers to a committee

(u) Local Government Act 1894 (56 & 57 Vict c 73) s 57 (5) Local Government (Elections) Act 1896 (59 & 60 Vict c 1) s 1 This latter Act is still in operation. See also p 268 *ante* and as to directing the simultaneous retirement of the councillors see title ELECTIONS, Vol XII, p 362

Other powers exercisable by the county council in matters affecting parishes are those relating to the compulsory acquisition of land by a parish council (*b*) loans by parish councils (*c*), complaints by a parish council or parish meeting that a rural district council is in default (*d*) the security to be given by the treasurer of a parish council (*e*) the custody of documents (*f*) the division of a parish into wards (*g*) the conferring of powers of a parish council on a parish meeting (*h*) the consent of a parish meeting to matters affecting part of a parish with defined boundaries (*i*) the grouping of parishes (*k*) the creation or dissolution of a parish council (*l*) the removal of disqualification in favour of a parish councillor (*m*) the ordering of a new election of a parish council (*n*) or parish councillor or guardian or auditor (*o*) the scale of election expenses (*p*) the name of a divided parish (*q*) securing the proper constitution of the parish councils (*r*)

SECT 10  
Powers etc.  
of the  
County  
Council  
—  
in and  
concerning  
parishes

**792** The Local Government Board have power to transfer to county councils certain powers and duties, either by provisional orders or by direct orders (*s*)

Powers of  
Local  
Government  
Board to  
transfer  
powers

(*b*) Local Government Act 1894 (56 & 57 Vict c 73) s 9 and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 167 *et seq*

(*c*) Local Government Act 1894 (56 & 57 Vict c 73) ss 11 (2) 12 see p 244 *ante*

(*d*) Local Government Act 1894 (56 & 57 Vict c 73) ss 16 19 (8) see p 375 *ante*

(*e*) Local Government Act 1894 (56 & 57 Vict c 73) s 17 (6) see p 250 *ante*

(*f*) Local Government Act 1894 (56 & 57 Vict c 73) s 17 (9) see p 253 *ante*

(*g*) Local Government Act 1894 (56 & 57 Vict c 73) s 18 see p 238 *ante*

(*h*) Local Government Act 1894 (56 & 57 Vict c 73) s 19 (10) see p 258 *ante*

(*i*) Local Government Act 1894 (56 & 57 Vict c 73) s 37 see note (*a*) p 258 *ante*

(*j*) Local Government Act 1894 (56 & 57 Vict c 73) ss 1 (1) 38 see p 240 *ante*

(*l*) Local Government Act 1894 (56 & 57 Vict c 73) s 39 see pp 239 240 *ante*

(*m*) Local Government Act 1894 (56 & 57 Vict c 73) s 46 (3) see p 241 *ante*

(*n*) Local Government Act 1894 (56 & 57 Vict c 73) s 47 (5) see p 241 *ante*

(*o*) Local Government Act 1894 (56 & 57 Vict c 73) s 48 (5) and as to guardians see title POOR LAW

(*p*) Local Government Act 1894 (56 & 57 Vict c 73) s 48 (7) see title ELECTIONS Vol XII pp 363 373

(*q*) Local Government Act 1894 (56 & 57 Vict c 73) s 55 (2) see p 239 *ante*

(*r*) Local Government (Elections) Act 1896 (59 & 60 Vict c 1) s 1 and see p 241 *ante*

(*s*) See the Local Government Act 1888 (51 & 52 Vict c 41) ss 4 10 Housing of the Working Classes Act 1890 (53 & 54 Vict c 70) Part III Local Government (Transfer of Powers) Act 1903 (3 Edw 7, c 15), Housing, Town Planning etc Act 1909 (9 Edw 7, c 44) s 13

## Part II—Conferring of Powers

SECT 1  
Borough  
Funds Acts  
1872 and  
1903

General  
powers to  
take pro-  
ceedings

Powers under  
Borough  
Funds Acts  
1872 and  
1903

Local and  
personal Bills

### SECT 1—*Borough Funds Acts, 1872 and 1903*

#### SUB SECT 1—*In General*

**793** Local authorities as trustees are entitled to take any proceedings including the opposition of Bills in Parliament which may be necessary for the protection of their own corporate existence or of their rights property and privileges and to charge the expenses upon their public funds or rates (a) They are also in many instances and for specific purposes expressly authorised by statutes to incur expenses (b) But beyond these common law and special statutory powers a further statutory power (c) of more general scope has been conferred on certain of such authorities subject to conditions and restrictions which however does not affect such common law and special statutory powers or any statutory rights vested in or exercisable by the inhabitants of the district (d) nor does it apply to applications for any Bill in Parliament for any object which would be obtainable by provisional order (e) The bodies which have this general statutory power are borough councils urban district councils (f), and county councils (g) but not rural district councils (h)

**794** Under this power it is competent for such authorities when they deem it expedient to do so to promote or oppose any local and personal Bill in Parliament or to prosecute or defend any legal

(a) See *A G v Brecon Corporation* (1878) 10 Ch D 204

(b) See generally the titles to which cross references are given at pp 233—236 *ante*

(c) Under the Borough Funds Act 1872 (35 & 36 Vict c 91) Borough Funds Act 1903 (3 Edw 7 c 14) the former Act does not apply to the City of London (Borough Funds Act 1872 (35 & 36 Vict c 91) s 11) see title METROPOLIS

(d) Borough Funds Act 1872 (35 & 36 Vict c 91) s 8 Borough Funds Act 1903 (3 Edw 7 c 14) s 4 See *Brooks Jenkins & Co v Torquay Corporation* [1902] 1 K B 601 where it was held that the Borough Funds Act 1872 (35 & 36 Vict c 91) s 8 exempted from the requirements of this Act the costs incurred by an urban district council in opposing a provisional order for the extension of a borough on the ground that such costs when sanctioned by the Local Government Board were authorised by the Public Health Act 1875 (38 & 39 Vict c 55) s 298

(e) Borough Funds Act 1872 (35 & 36 Vict c 91) s 10

(f) *Ibid* s 1 The statute terms them governing bodies and the term district is defined to mean the borough place township or district within which the governing body has jurisdiction (*ibid* s 1) and the term council in the Borough Funds Act 1903 (3 Edw 7 c 14) s 9 includes the council of every borough including metropolitan boroughs which were excluded by the Borough Funds Act 1872 (35 & 36 Vict c 91) s 11

(g) Local Government Act 1888 (51 & 52 Vict c 41) s 15; County Councils (Bills in Parliament) Act 1903 (3 Edw 7, c. 9) and see p 374, *ante*

(h) See definition of governing bodies in the Borough Funds Act, 1872 (35 & 36 Vict c 91) s 1 and *Oleertson v St Germain's Union Rural Sanitary Authority* (1888), 56 L J (Q B) 83.

proceedings (i) necessary for the promotion or protection of the interests of the inhabitants of their districts. For such purposes they may apply their funds or rates to the payment of the costs and expenses and if there be several funds or rates under their control they may determine out of which the expenses shall be payable and in what proportion (l). The same power includes the right of these councils to be petitioners and to appear to oppose Bills to confirm provisional orders made under the Railway and Canal Traffic Act 1888 (l) and to provide or contribute towards the expenses of the appearance or opposition of a petitioner out of their funds or rates (m).

SECT 1  
Borough  
Funds Acts  
1872 and  
1903

Bills to  
confirm pro-  
visional  
orders under  
Railway and  
Canal Traffic  
Act 1888

**795** The above power cannot be used to promote or oppose a Bill the promotion of or opposition to which has been decided by a committee of either House of Parliament to be unreasonable or vexatious (n) nor can any member of the local authority be paid for acting as counsel or agent in the matter (o). Further a Bill for the establishment of gas or water works cannot be promoted in competition with any like existing works established by Act of Parliament (p).

Limits on  
the power

Beyond the special conditions attached to the promotion of Bills by a borough or urban district council (q) the following conditions are imposed in relation both to their promotion and opposition by any local authority—

Conditions  
under which  
power is  
exercisable

(i) There must be a resolution in favour of such promotion or opposition passed by an absolute majority of the whole council at a meeting of the council. (ii) there must be over and above the ordinary notices required for the convening of such meeting, ten clear days notice by public advertisement of the meeting, and of its purpose in a local newspaper, (iii) the resolution must have been published twice in a local newspaper (q). (iv) the resolution must have received the approval of the Local Government Board (r) which cannot be given until the expiration of seven days after the second publication of the resolution, and meanwhile any ratepayer in the district may give notice in writing to the Board objecting to such approval (s). (v) in the case of the promotion of a Bill no further expense can be incurred or charged after the deposit of the

(i) See *Tynemouth Corporation v A G* [1899] A C 293. As to proceedings in Parliament see title PARLIAMENT.

(k) Borough Funds Act 1872 (35 & 36 Vict c 91) s 2.

(l) 51 & 52 Vict c 25 s 24 see title RAILWAYS AND CANALS.

(m) Railway and Canal Traffic (Provisional Orders) Amendment Act 1891 (54 & 55 Vict c 12) s 1. In the case of county councils the consent of owners and ratepayers is not necessary (*ibid*).

(n) Borough Funds Act 1872 (35 & 36 Vict c 91) s 2.

(o) *Ibid* s 3.

(p) *Ibid* s 2 and see titles GAS Vol XV pp 310 *et seq* and WATER SUPPLY.

(q) Borough Funds Act 1872 (35 & 36 Vict c 91) s 4 see the text *infra*.

(r) Borough Funds Act 1872 (35 & 36 Vict c 91) s 4. The power formerly possessed by a Secretary of State is transferred to the Local Government Board (Borough Funds Act 1903 (3 Edw 7 c 14), s 3).

(s) Borough Funds Act, 1872 (35 & 36 Vict c 91), s 5.



SECT 1  
Borough  
Funds Acts  
1872 and  
1903

Costs and  
local  
inquiries

Bill, unless the propriety of the promotion has been confirmed by a like absolute majority at a further special meeting after a like notice held not less than fourteen days after the deposit of the Bill in Parliament (t)

**796** Costs charges and expenses before they become chargeable, require to be examined and allowed by some person authorised by the Local Government Board (a) and the Board may direct a local inquiry to be held upon any application by any person or persons nominated by the Board for the purpose and may charge the costs and expenses of such inquiry upon the local authority or the applicant (b)

SUB SECT 2—*Promotion of Bills by Borough and Urban District Councils*

Con ent f  
parochial  
electors

**797** Beyond the general conditions already specified, no expense in relation to the promotion of a Bill can be charged by the council of a borough or urban district until the consent of the parochial electors (c) has been obtained after the due deposit of the Bill (d) Non compliance with the statutory provisions does not invalidate the charge of expenses in relation to the promotion if the provisions have been substantially complied with and the failure has not affected the result of the proceedings (e)

Procedure for  
obtaining  
consent

**798** Within seven days from the first deposit of the Bill notice must be given by placards and by advertisement in a local news paper in two successive weeks, that a public meeting of electors will be held on a specified day (f) for the purpose of considering the question of the promotion of the Bill, and indicating the resolutions to be submitted to the meeting (g)

The public  
meeting

The public meeting must be held in accordance with the notice, and the mayor or chairman (h) if able and willing presides (i)

(t) Borough Funds Act 1872 (35 & 36 Vict c 91) s 4 The consent of owners and ratpayers to opposing Bills is no longer necessary (Borough Funds Act 1903 (3 Edw 7 c 14) s 7 (1)) As to a substituted consent in the case of promotion Bills see the text *infra*

(a) Borough Funds Act 1872 (35 & 36 Vict c 91) s 6

(b) *Ibid* s 7

(c) That is those for the time being enrolled in the register of parochial electors in force in the borough or urban district (Borough Funds Act 1903 (3 Edw 7 c 14) s 9)

(d) *Ibid* s 1 In the Railway and Canal Traffic (Provisional Orders) Amendment Act 1891 (54 Vict c 12) s 1 references to the Borough Funds Act have effect as references to both Acts (Borough Funds Act 1903 (3 Edw 7 c 14) s 7 (2))

(e) *Ibid* s 6

(f) Not being less than fourteen nor more than twenty eight days after the first advertisement (*ibid* Sched I (1) (e))

(g) *Ibid* Sched I (1) (2) The notice must also state the title and objects of the Bill the fact that it has been deposited and the date of its first deposit that copies of it may be inspected and purchased at a specified place in the borough or district during the fourteen days after the date of the first advertisement and that extracts may be taken free of charge (*ibid*)

(h) That is the mayor of the borough or the chairman of the urban district council (*ibid* s 9)

(i) *Ibid* Sched I (3) If unable or unwilling the council may appoint

With the consent of the majority the meeting may adjourn for not more than seven days (*k*)

The question of the promotion of the Bill is put by the president (*l*) either by a single resolution in favour of the promotion or by a series of resolutions in favour of the promotion of parts or clauses of the Bill but so that the whole Bill is covered. The meeting decides for or against the resolutions (*m*) and the decision of the meeting on the resolution or resolutions is final unless a poll is demanded (*n*)

A poll may be demanded as to any resolution on a requisition by not less than 100 electors (*o*) or one twentieth in number of the electors whichever is the less. If the decision is adverse to the resolution the council may demand a poll (*p*)

Unless the requisition or the Bill or the parts or clauses in question be withdrawn the mayor or chairman must proceed with the poll (*q*) and the polls on any number of resolutions may be taken at the same time and on the same voting paper. The result of the voting is to be declared as soon as practicable by the mayor or chairman and his decision as to any question arising in respect of a voting paper is final (*a*)

Subject to the above provisions the poll is to be taken in accordance with regulations framed and in forms prescribed by the Local Government Board (*b*)

If the poll is adverse to the Bill or parts of it the council must

a president failing both or in the absence of both after ten minutes from the appointed time the meeting may choose an elector (see note (*c*) p 382 *ante*) to be president (Borough Funds Act 1903 (3 Edw 7 c 14) Sched I (3))

(*k*) *Ibid* Sched I (4)

(*l*) At the opening of the meeting the president or a member or officer of the council must explain the Bill (*ibid* Sched I (5))

(*m*) *Ibid* Sched I (6) The president is to explain to the meeting the resolutions he proposes to put and the question of promotion must be put as so proposed but the meeting may require separate resolutions or further separate resolutions to be put (*ibid*)

(*n*) *Ibid* Sched I (7)

(*o*) See note (*c*) p 382 *ante*. A requisition for a poll by electors must be in writing signed by the persons making it and must be delivered to the mayor or chairman within seven days after the date of holding the meeting or an adjournment thereof (Borough Funds Act 1903 (3 Edw 7 c 14) Sched I (9))

(*p*) *Ibid* Sched I (8) A requisition for a poll by the council requires authority by a resolution of the council a copy of which is to be delivered to the mayor or chairman within seven days after the holding of the meeting or an adjournment thereof unless the regulations do not admit of an ordinary meeting of the council being held in time in which case the time is extended to three days after the next ordinary meeting of the council (*ibid* Sched I (10))

(*q*) *Ibid* Sched I (11) As to the mayor and chairman see notes (*h*) (*i*), p 382 *ante*. As to the withdrawal of a requisition under the former provisions see *E v Dover (Mayor)* [13] 1 K B 668

(*a*) Borough Funds Act 1903 (3 Edw 7 c 14) Sched I (12)—(15) If the mayor or chairman is unable or unwilling to perform any of the above duties the council may appoint someone for the purpose (*ibid*)

(*b*) *Ibid* Sched I (16) Various other provisions are made to secure the fair and proper taking of the poll, and penalties are imposed for breaches thereof (*ibid* s 5)

SECT 1  
Borough  
Funds Acts  
1872 and  
1903

The resolu-  
tions

The poll

Withdrawal  
of Bill on  
adverse poll.

**SECT 1**  
**Borough**  
**Funds Acts**  
**1872 and**  
**1903**

take all necessary steps to withdraw it or such parts of it, and an equality of votes is deemed to be an adverse poll (c) On the withdrawal of the whole or parts no further expense must be incurred in respect thereof but all costs, charges, and expenses incurred by the council or mayor or chairman in or incidental to the preparation and promotion of a Bill up to and including its withdrawal if withdrawn and in or incidental to the holding of the meeting and taking of the poll are when taxed by a taxing officer in one of the Houses of Parliament and allowed by the Local Government Board to be charged on and payable out of such one or more of the council's public funds or rates as the council having regard to the nature and objects of the Bill may determine to be just and proper and when charged on more than one fund or set of rates, in such proportions as it may determine (d)

**SECT 2—Local Acts**

**Power of**  
**Local**  
**Government**  
**Board**

**799** Where a local Act is in force in any area comprising the whole or part of the district of an urban district council (c) and relates to the same subject matters as the Public Health Acts (f) \*\* the Local Government Board may on the application of the council by provisional order (f) wholly or partially repeal alter or amend the local Act (g) but this power cannot be exercised in respect of an Act for the conservancy of rivers or of an Act which confers powers or privileges on any person for his own pecuniary benefit (h)

**Limits of**  
**power**

**Contents of**  
**order**

The provisional order may provide for the extension of the provisions of the local Act beyond the district within the limits of the Act or for the exclusion of the whole or a portion of any such district from the application of the Act It may also provide what local authority is to have jurisdiction for the purposes of the Public Health Acts in any included or excluded area (i)

**Settlement of**  
**differences**

Differences as to powers rights duties capacities liabilities obligations, or property arising out of any transfer under the

(c) Borough Funds Act 1903 (3 Edw 7 c 14) s 2

(d) *Ibid* s 3

(e) Or rural district council or council of a borough (see p 262 *ante*)

(f) See generally and as to provisional orders titles PARLIAMENT PUBLIC HEALTH AND LOCAL ADMINISTRATION

(g) Public Health Act 1875 (38 & 39 Vict c 55) s 303 As to the effect of this or similar sections see *Monmouth Corporation v Monmouth (Churchwardens etc)* (1878) 38 L T 612 *North Eastern Rail Co v Tyne mouth Corporation* (1868) L R 3 Q B 723 Power was given to the Local Government Board to continue the effect of the provisions of local Acts in a borough which provided for sanitary expenses being divided between landlords and tenants under contracts existing in 1872 (Public Health Act 1875 (38 & 39 Vict c 55) s 320) But the provision is now practically spent As to proceedings under local Acts which are still in force see *ibid* s 340

(h) *Ibid* s 303 As to limitation of rates under a local Act not applying to rates for expenses under *ibid* see *ibid* s 227 and as to rating exemptions under local Acts applying to general district rates, see title RATES AND RATING

(i) Public Health Act, 1875 (38 & 39 Vict c 55) s 303

provisional order may be (h) settled and any accounts in connection with the same are to be adjusted by order of the Board (l)

ECT 2

Local Acts

Any officer of the authority under the local Act who by virtue of the provisional order is removed from his office or deprived of emoluments of office may be awarded compensation (m)

Compensation  
to officers

### SECT 3—*Public Health Acts*

SUB SECT 1—*Under the Public Health Acts Amendment Act 1890*

#### (1) *Urban Councils*

**800** Urban councils by a resolution passed at a meeting of the council (n) may acquire the powers under this Act by adopting all or any of its parts (o) Method of adoption

The resolution comes into operation at such time not less than one month after the first publication of the advertisement as may be fixed by the council and the parts adopted then extend to its district (p)

**801** Having adopted this Act (q) an urban authority whether a municipal corporation or an urban district council with power in any capacity to borrow money may with the consent of the Local Government Board, exercise that power by the creation and issue of stock in accordance with in all respects the regulations of the Board (r) Power to borrow and raise stock

(k) This is not made the only method

(l) Public Health Act 1875 (38 & 39 Vict c 55) s 304

(m) *Ibid* s 309 This provision is now largely superseded by the powers which are given to county councils and the Local Government Board when dealing with or affecting the areas of local authorities see p 377 *ante* and see further on the matter generally title PUBLIC AUTHORITIES AND PUBLIC OFFICERS

(n) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 3 (3) see further as to procedure for adoption title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(o) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 3 (1) 11 (3) (referred to in this sub section of the title as this Act) Part II of this Act relates to telegraph wires etc see titles ELECTRIC LIGHTING AND POWER Vol XII pp 549 551 552 HIGHWAYS STREETS AND BRIDGES Vol XVI pp 259 260 NUISANCE TELEGRAPHS AND TELEPHONES Part IV relates to music and dancing see titles THEATRES AND OTHER PLACES OF ENTERTAINMENT Other powers which may be acquired relate to sanitary matters generally (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) and finance (see p 386 *post*)

(p) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 3 (4)

(q) *Ibid* s 52 (1)

(r) The regulations are to be laid before Parliament and if no resolution is passed against them they become operative when confirmed by an Order in Council (*ibid* s 52 (3) (4)). The regulations in force are dated 28th September 1891 31st August 1897 8th August 1901 They may provide for the discharge of the loan raised by stock in the case of consolidation of debt for extending or varying the times within which loans may be discharged for the consent of limited owners for the application of the Acts relating to stamp duties (see title REVENUE) and cheques for the disposal of unclaimed dividends and for the application, with or without modifications of the Local Loans Act 1875 (38 & 39 Vict c 83) and the Local Loans Sinking Fund Act 1885 (48 & 49 Vict c 30) and of any Act relating to stock issued by the corporation of any municipal borough (Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 52 (2))

SECT 8  
Public  
Health Acts  
Capital duty

**802** Before the issue of loan capital (s) a duly stamped statement of the amount proposed to be secured must be delivered to the Commissioners of Inland Revenue (t) The statement should not be delayed beyond the issue of the scrip certificates (a)

(u) *Rural Councils*

Power of  
rural  
councils to  
adopt  
Power to  
apply  
provisions  
to rural  
districts

**803** Rural councils may adopt by the same methods as urban councils the provisions of Part III of this Act (b) relating to matters more particularly dealt with elsewhere (c)

The Local Government Board may declare that any provisions in any part of this Act (d) which are not in force in a rural district shall be in force in such district or any part of it and may invest the rural district council with any of the powers rights and liabilities which an urban council may acquire by adopting this Act (e)

(uu) *Expenses and Proceedings*

Expenses

**804** Expenses under this Act (f) are defrayed by the urban council as part of its expenses under the Public Health Acts and by rural councils as general expenses under those Acts (f)

The provisions of the Public Health Act 1875 (g) govern legal proceedings and bye laws under this Act (h)

(s) This applies to loan capital issued by local authorities i.e. county councils municipal corporations district councils dock trustees harbour trustees or other local bodies however called corporations companies or bodies of persons formed or established in the United Kingdom (Finance Act 1899 (62 & 63 Vict c 9) s 8(1) (5)) For the definition of loan capital see *ibid* s 8(5) title COMPANIES Vol V p 362 For instances of the application of this provision to companies issuing debenture stock in redemption of existing stock see *A G v Legent's Canal and Dock Co* [1904] 1 K B 263 C A *London and India Docks Co v A G* [1909] A C 7

(t) Finance Act 1899 (62 & 63 Vict c 9) s 8(1) (2) see further for rates of duty penalties etc title COMPANIES Vol V p 362 A rebate may be granted at the rate of 2s for every £100 of capital issued after the 9th August 1907 and wholly or partly applied for the purpose of the conversion or consolidation of the existing loan capital The rebate does not however apply to duty payable in respect of a mortgage or marketable security which has been paid on a trust deed or other document securing the loan capital issued (Finance Act 1907 (7 Edw 7 c 13) s 10(1)) In order to give effect to this rebate and so that the payment of duty and the rebate may constitute one transaction the Commissioners may postpone the delivery of the above mentioned statement until the issue of the capital when it is represented that the issue of loan capital is to be so applied (*ibid* s 10(2)) As to stamp duties generally see title REVENUE

(a) See *A G v Liverpool Corporation* [1902] 1 K B 411

(b) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) ss 3(2) 11(3) 50 This is a general provision which does not affect the power of the Local Government Board to invest such councils with other powers (*ibid*)

(c) See titles NUISANCE PUBLIC HEALTH AND LOCAL ADMINISTRATION SEWERS AND DRAINS and see title HIGHWAYS STREETS AND BRIDGES,

(d) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 49 Vol XVI pp 1 *et seq*

(e) *Ibid* s 5 see further title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(f) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 4 (g) 38 & 39 Vict c 55

(h) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) ss 6 9 Informations complaints warrants and summonses may contain several sums (*ibid*, s. 8)

An appeal is given to quarter sessions to any person aggrieved by any order, judgment, determination, or requirement of a council under this Act, by the withholding of any order, certificate, licence, consent or approval by the council, and by any summary conviction (a) except in cases in which there is an appeal to the Local Government Board (j)

The powers conferred are cumulative, but offenders are not liable to penalties under more than one Act in respect of the same offence (k)

**SUB SECT 2—Under the Public Health Acts Amendment Act 1907 (l)**

**805** The Act of 1907 (m) is divided into ten parts, the first of which is general in character and applies generally, and the remaining parts only operate as and when applied (n) The expenses of executing the part applied are in the case of urban authorities, part of their expenses incurred in executing the Public Health Acts and in the case of rural authorities are general expenses unless otherwise directed by the Local Government Board (o)

Its parts.

Expenses.

Offences under the Act of 1907 (p) or under bye laws made under any of the Public Health Acts are prosecuted and penalties etc recovered as under those Acts (p), appeals to quarter sessions are allowed (q) except as otherwise expressly provided in the Act of 1907 (r) and except when an appeal lies to the Local Government Board (s) Such an appeal is declared to exist in any case under

Miscellaneous

(a) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 7 (1)

(j) *Ibid* s 7 (2) That is under the Public Health Act 1875 (38 & 39 Vict c 55) s 268 as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION As to procedure on appeals to quarter sessions generally see title MAGISTRATES p 650 *post*

(k) Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 10

(l) 7 Edw 7 c 53 referred in this sub section of the title as the Act of 1907 It came into operation on 1st January 1908 (*ibid* s 2 (1) (3) (5)) It is construed as one with the Public Health Acts (see generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION) which may be cited as the Public Health Acts 1875—1907

(m) Public Health Acts Amendment Act 1907 (7 Edw 7 c 53) ss 1 2 (2)

(n) Any part or sections of the Public Health Acts Amendment Act 1907 (7 Edw 7 c 53) ss 3 (1) 13 may on the application of an urban sanitary authority (which includes a borough council) an urban district council or a rural district council be declared to be in force in the district in any contributory place therein (*ibid* ss 3 (1) (4) 13) the Act may be made to supersede the provisions of any local Act in such district or contributory place (*ibid* s 3 (11)) Such powers when conferred are cumulative (*ibid* s 11) As to contributory places see p 335 *ante* As to the authority to make and the form of the order see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(o) Public Health Acts Amendment Act 1907 (7 Edw 7 c 53) s 4 The rights of the Crown are not affected by anything done under this Act see title CONSTITUTIONAL LAW Vol VII pp 205 206

(p) Public Health Acts Amendment Act 1907 (7 Edw 7 c 53) s 6 More than one sum may be contained in any information complaint warrant or summons (*ibid* s 8)

(q) *Ibid* s 7 (1) The instances are the same as those in the Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) s 7 (1)

(r) Public Health Acts Amendment Act, 1907 (7 Edw 7 c 53) s 7 (1) Other provisions are found in *ibid* ss. 42 and 48 giving an appeal from a requirement of the local authority to a court of summary jurisdiction As to appeals to quarter sessions generally see title MAGISTRATES, p 638, *post*

(s) That is, under the Public Health Act, 1875 (38 & 39 Vict c 55), s. 268

Public Health Acts

**Public  
Health Acts**

the Act of 1907 (*t*) in which the local authority gives a decision in a matter as to which it can recover expenses in a summary manner or can declare them to be private improvement expenses (*t*) Byelaws are regulated by the provisions of the Public Health Acts except that the confirming authority for bye laws relating to the police is the Secretary of State (*a*) Compensation costs damages or expenses when directed to be paid, and the method of determining the amount if not otherwise directed are to be ascertained as under the Public Health Acts (*b*)

SUB SECT 3—*Local Government Board Inquiries*

**806** The Local Government Board may cause to be made such inquiries as are directed by the Public Health Acts (*c*) and such inquiries as they see fit in relation to any matters concerning the public health or any matters with respect to which their sanction approval or consent is required by the Public Health Act 1875 (*d*)

(*t*) Public Health Acts Amendment Act 1907 (7 Edw 7 c 53) s 7 (2)

(*a*) *Ibid* s 9

(*b*) *Ibid* s 10

(*c*) See generally title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*d*) Public Health Act 1875 (38 & 39 Vict c 55) ss 293 296

## LOCOMOTIVES

See RAILWAYS AND CANALS STEAM AND AERIAL TRAFFIC

## LODGING HOUSES

See LANDLORD AND TENANT PUBLIC HEALTH AND LOCAL  
ADMINISTRATION

## LONDON

See METROPOLIS

## LORD CHANCELLOR

See CONSTITUTIONAL LAW COURTS ECCLESIASTICAL LAW,  
MAGISTRATES PARLIAMENT

## LORD HIGH STEWARD

See CONSTITUTIONAL LAW, COURTS PARLIAMENT

## LORDS, HOUSE OF

See CONSTITUTIONAL LAW, COURTS PARLIAMENT, PRACTICE AND  
PROCEDURE

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See GAMING AND WAGERING





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*For Abduction  
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## Part I—Definitions and Classification

### SECTION 1—Definitions

A defect of reason

Judged by ordinary standard of human intelligence

Illusions and hallucination

**807** Lunacy or insanity may be shortly defined as a defect of reason consisting either in its total or partial absence or in its perturbation (a) The perturbation or absence of reason which constitutes insanity is an abnormal state of the mind of a man judged by a standard which recognises a normal standard of rationality and pronounces that man to be insane Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing emotion and or willing can be performed in their regular and usual manner Insanity means a state in which one or more of the above named mental functions is or are performed in an abnormal way or not performed at all by reason of some disease of the brain or nervous system (b) The question whether any man is lunatic or insane can only be decided by reference to the ordinary standard of human intelligence

A man who suffers at times from illusions or hallucinations is not necessarily insane (c) he may be able at other times to recognise

(a) Pope *Law and Practice of Lunacy* 2nd ed 1 *Banks v Goodfellow* (1870) L R 5 Q B 549 565 *Smees v Smees* (1879) 5 P D 84 *Jenkins v Morris* (1880) 14 Ch D 614 O A

(b) 2 Stephen *History of the Criminal Law of England* 130

(c) 1 Taylor *Principles and Practice of Medical Jurisprudence* 6th ed 846

such illusions or hallucinations for what they really are it is the persistence of such illusions or hallucinations which is indicative of insanity. A man who having conceived something extravagant to exist which has no existence but in his own heated imagination and who is incapable of being permanently reasoned out of that conception is said to be under a "delusion" and if the delusion is one which in the judgment of an ordinary person, no man in possession of his senses could have entertained the man suffering from such delusion is to be held lunatic or insane (*d*).

## SECT 1 Definitions

### SECT 2—Classification

#### SUB SECT 1—In General

**808** The legal terminology of insanity is neither consistent nor comprehensive. The various expressions denoting insanity are not used in an uniform sense nor are there any names to distinguish civil incapacity from criminal irresponsibility (*e*). The word lunatic which is first found in the Statute Book in stat (1541 2) 33 Hen 8 c 20 is there applied to those who have become insane after birth and is used by Coke (*f*) and Hale (*g*) as applicable to persons whose insanity is temporary or intermittent. In stat (1541 2) 33 Hen 8 c 20 however the word is used as an alternative for madness and in stat (1548) 2 & 3 Edw 6 c 8 the words lunatic and idiot are used indiscriminately and similarly, in the writ *de lunatico inquirendo* the word is used to cover all forms of insanity. In the Lunacy Act 1890 (*h*) the word lunatic means an idiot or person of unsound mind. The expression *non compos mentis* is used in the old Statute of Limitation (*i*) as a general term and is approved of by Coke as being most sure and legal (*j*).

Legal terminology

In relation to the nature of their mental incapacity the insane have been divided into three main classes (*k*). (1) Idiots that is persons who were born insane (2) lunatics that is persons who

Division in relation to nature of mental incapacity

(*d*) *Boughton v Knight* (1873) L R 3 P & D 64 68 and see *Last India Co and Prinsep v Dyce Sombre* (1806) 4 W R 714 716

(*e*) Pope Law and Practice of Lunacy 2nd ed 10 11 and compare Bract 420 *Ex parte Cranmer* (1906) 12 Ves 445 450 451 n and Co Litt 246 b

(*f*) *Beverley's Case* (1603) 4 Co Rep 123 b Co Litt 247 a

(*g*) 1 Hale P O 34

(*h*) 53 & 54 Vict c 6 s 341

(*i*) Stat (1581) 23 Eliz c 3 s 3 Limitation Act 1623 (21 Jac 1 c 16) s 7

(*j*) Co Litt 246 b and see *Ex parte Barnsley* (1744) 3 Atk 163 per Lord HARDWICKE I C at p 173 compare 1 Taylor Principles and Practice of Medical Jurisprudence 6th ed 811

(*k*) Apart from some variations in terminology both Coke and Hale agree in this division. Coke divides persons *non compos mentis* into four classes (1) idiot from birth (2) he who by sickness grief or other accident wholly loses his memory or understanding (3) a lunatic who *aliquando gaudet lucidis intervalles* and has sometimes his understanding and sometimes not (4) by his own vicious act as a drunkard (Co Litt 247 a *Beverley's Case* (1603) 4 Co Rep 123 b 124 b). Hale distinguishes *dementia* or insanity as being (1) idiocy or fatuity *a natiuitate vel dementia naturalis* (2) *dementia accidentalis vel adventitia* which may be classified as (1) partial either (a) in respect of things *pro ad hoc vel illu insanire* or (b) in respect of degrees and (2) total or as (1) permanent or fixed when it is called *phrenesis* and (2) interpolated and by certain periods or

**SECT 2**  
**Classification.**

have become insane since birth and (8) lunatics by their own act for instance drunkards (*l*)

The second class above mentioned may be subdivided into (i) persons completely insane either with or without hope of recovery (ii) persons insane with lucid intervals and (iii) persons suffering from partial insanity or monomania (*m*)

**Statutory division**

**809** The Lunacy Act 1890 (*n*) in effect divides lunatics so found by inquisition into two classes (1) persons of unsound mind so as to be incapable of managing themselves or their affairs and (2) persons of an sound mind so as to be incapable of managing their affairs though capable of managing themselves

The provisions of the Lunacy Act 1890 (*o*) relating to management and administration are extended to persons who are not lunatics so found but with regard to whom it is proved that through mental infirmity arising from mental disease or age they are incapable of managing their affairs (*p*)

**SUB SECT 2 — Idiots**

**Idiot a person born insane**

**810** The word 'idiot' may be taken to denote at the present time a person born insane (*q*) Various tests of idiocy have been suggested (*r*) but the question whether one is idiot or not is a question of fact triable by jury and sometimes by inspection (*s*)

**Persons born deaf and dumb**

A person born deaf and dumb (*t*) is presumed to be an idiot but

vicissitudes when it is called lunacy or as (1) more dangerous and pernicious commonly called *furor rabies mania* (2) less so such as in deep *delirium stupor* and (iii) *dementia affectata* namely drunkenness (1 Hale I O 29 *et seq*)

(*l*) Drunkenness is not now generally regarded as a form of insanity (but see 1 Taylor Principles and Practice of Medical Jurisprudence 6th ed 595) and it was never held to confer a privilege or excuse an act (Co Litt 241 *n*) As to contracts with drunkards see title CONTRACTS Vol VII p 342 and as to crimes committed by drunkards see title CRIMINAL LAW AND PROCEDURE Vol IX p 242

(*m*) As to these three subdivisions see pp 395 396 *post*

(*n*) 53 & 54 Vict c 5 s 98 (*r*) *Re Townshend* (Lord Townshend v Robins [1908] 1 Ch 201 The issues directed by the old writs and commissions in the nature of writs went to the kind of insanity and also its commencement and other matters relating to the alleged lunatic (*Ex parte Cranmer* (1806) 12 Ves 445 449 *Ex parte Smith* (1818) 1 Swan 4 6) By the Lunacy Act 1890 (53 & 54 Vict c 5 s 98 (1)) the inquisition is confined to the question whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself or his affairs But it may be specially certified that the alleged lunatic is capable of managing himself and not dangerous though incapable of managing his affairs.

(*o*) 53 & 54 Vict. c 5

(*p*) 53 & 54 Vict. c 5 s 116 (1) (*d*) *Re Dewhurst's Trusts* (1886), 33 Ch D 416 C A *Re Martin's Trusts* *Re Martin* (a Person of Unsound Mind) *Land Building, Investment and Cottage Improvement Co v Martin* (1887) 34 Ch D 618 C A, *Re Barker* (1888) 39 Ch. D 187 C A *Re Campbell* [1888] W N 176 C A *Re M* [1899] 1 Ch 79 and see p 429 *post*

(*q*) The word 'idiot' is used in early English literature as signifying an unlearned or illiterate person (see Wyclif's Bible 1 Cor xiv 16)

(*r*) Compare Fitz Nat Brev 233 Staundford Exposition of the King's Pre rogative 34 Swinburne on Wills 42.

(*s*) 1 Hale P O 29, and see *Ball v Mannen* (1829) 1 Dow & Cl 330 392 H L *Rockfort v Ely* (Lord) (1774) 1 Ridg Parl Rep 552 *Prodgers v Frazer* (1684) 3 Mod Rep 43

(*t*) 1 Hale P O 34.

the presumption may be rebutted (*u*) The presumption that a person born deaf, dumb and blind is an idiot is still stronger (*v*), but it is conceived that this presumption also can be rebutted (*w*)

SECT 3  
Classification

**811** The distinction between an idiot and a lunatic was that the law presumed an idiot for ever to be incapable of attaining a complete degree of understanding to govern himself or his estate and all his acts done to bind his estate were avoided (*a*) but a lunatic was presumed to be capable of recovering the reason which he had lost (*b*)

Distinction  
between an  
idiot and a  
lunatic

In the Idiots Act 1886 (*c*) idiots and imbeciles are expressly distinguished from lunatics (*d*) but, except so far as is thereby provided the legal distinction between idiots and lunatics is now practically abolished and a person detained in an asylum under the Idiots Act 1886 (*c*) is a person lawfully detained as a lunatic within the meaning of the Lunacy Act 1890 (*e*), s 116 (*f*)

#### SUB-SECT 3—Lunatics

**812** From the explanation of lunatic given above (*g*) it is seen that the word denotes a person who has become insane as distinguished from a person who was born insane, and further that the word includes a person who is insane either with or without lucid intervals and either with or without hope of recovery,

Definition of  
lunatic

**813** The term "lucid interval" occurs in the Statute of Prerogatives (*h*) and commonly in verdicts of lunacy (*i*) To support an act done during a lucid interval it is not necessary to show that the mind has been restored in its integrity it is enough to show that the party was sufficiently recovered to enable him to understand the nature of the act and that any delusion from which he still suffers did not affect the act (*j*) The lucid interval is of importance because with few exceptions the acts of a lunatic during the lucid interval possess the validity and involve the responsibility of the acts of a sane man (*k*)

Lucid  
interval

(*u*) *Elyot v Case* (1666) Cart 53 *R v Ruston* (1786) 1 Leach 450 *Dickenson v Blisset* (1754) 1 Dick 268

(*v*) Co Litt 42 b

(*w*) The principle of the decisions in *Elyot v Case supra* and *R v Ruston supra* support this view having regard to the improved methods of educating the deaf dumb and blind in recent years

(*a*) 1 Bl Com 302

(*b*) *Re Fitzgerald a Lunatic* (1805) 2 Sch & Lef 432 *Re Hinde ex parte Whitbread* (1816) 2 Mer 99 102

(*c*) 49 & 50 Vict c 25

(*d*) *Ibid* s 17 see pp 429 526 *post*

(*e*) 53 & 54 Vict c 5

(*f*) *Re Whalley (Mark)* and *Re Whalley (W R)* [1906] 1 Ch 560 C A

(*g*) See pp 393 394 *ante*

(*h*) Stat (*temp incert*) c 12

(*i*) *Ex parte Wragg* (1800) 5 Ves 449 *Re Bruges* (1836) 1 My & Cr 278 and compare Co Litt 247 a 1 Bl Com 274

(*j*) *Ex parte Hoyland* (1800) 11 Ves 10 dissenting from *A G v Parnter* (1792) 3 Bro CC 441 and see *Creagh v Blood* (1846) 8 I Eq R 434 SC 2 Jo & Lat 509

(*k*) Bract 420 *Beverley v Case* (1603) 4 Co Rep 123 b As to lucid intervals after a finding of lunacy, see note (*e*), p 403 *post*

## SECT 2

## Classification

Legal recognition of partial insanity

**814** The existence of partial insanity is recognised both in the criminal law (*l*) and, after strenuous denial in the civil law (*m*) In order to invalidate a will or a deed on the ground that the person is under some delusion it must be shown that the disposition is the unqualified result of the delusion itself Partial unsoundness of mind not affecting the general faculties and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will (*n*) and the same principle has been applied in the case of a contract (*o*)

## Part II—Civil Capacity

## SECT 1—Contracts and Dispositions

## SUB SECT 1—In General

General legal theory

**815** The general theory of the law in regard to acts done (*p*) and contracts made by parties affecting their rights and interests is that in all cases there must be a free and full consent to bind the parties (*a*) Consent is an act of reason accompanied by deliberation and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of idiots lunatics and other persons of unsound mind have been generally deemed to be invalid or in other words there cannot be a contract by a lunatic (*b*) Thus (1) the feoffment or grant of a lunatic whether personally or by attorney (*c*) (2) the deed of a lunatic (*d*) and (3) the simple contract of a lunatic other than in market overt is as a rule void or voidable (*e*)

No contract by a lunatic

(*l*) *McNaghten's Case* (1843) 10 Cl & Fin 200 209—211 H I title CRIMINAL LAW AND PROCEDURE Vol IX p 241 compare 2 Stephen History of the Criminal Law of England 92 *Irwin's (Earl) Case* (1660) 19 State Tr 886 94

(*m*) See in particular *Waring v Waring* (1845) 6 Moo P C O 341 *Smith v Tebbitt* (1861) L R 1 P & D 398 *Smee v Smee* (1879) 5 P D 84 *Jenkins v Morris* (1880) 14 Ch D 614 O A

(*n*) *Banks v Goodfellow* (1860) 1 R 5 Q B 549 *Murfett v Smith* (1887) 12 P D 116 *Jenkins v Morris* *supra* *Smee v Smee* *supra* see p 403 post

(*o*) *Birkm v Hing* (1890) 63 L T 80

(*p*) As to the criminal capacity of lunatics see title CRIMINAL LAW AND PROCEDURE Vol IX p 241 and see *ibid* pp 354 436 *R v Ireland* [1910] 1 K B 654 O C A *H v Smith* (1910) 26 T L R 614 O C A The Lunacy Act 1890 (53 & 54 Vict c 5) does not except as expressly provided, only to criminal lunatics see *ibid* s 340 (1) *Re R* [1902] 1 Ch 1

(*a*) 1 Story 13th ed 237

(*b*) *Re Rhodes Rhodes v Rhodes* (1890) 44 Ch D 94 105 O A and compare Just Inst Bk III tit 19 s 8 Bract, Bk 3 c 2 s 8 Fleta Bk 2 c 56, s 19 *Beverley's Case* (1603) 4 Co Rep 123 b

(*c*) *Beverley's Case* *supra* 2 Roll Abr tit Feoffment B pl 3 4 Shep Touch (ed Preston) 204 205

(*d*) *Thompson v Leach* (1690) 3 Mod Rep 301 *Evans v Blood* (1747) 3 Bro Parl Cas 632 *Louch d. Abbot and Hallet v Parsons* (1765) 3 Burr 1794 *Saunderson v Marr* (1788) 1 Hy Bl 75 *Yates v Boen* (1738) 2 Stra 1104 *Faulder v Silk* (1811) 3 Camp 126 *Snook v Watts* (1848) 11 Beav 105 *Jacobs v Richards* (1854) 5 De G M & G 55 O A and see Sugden on Powers 7th ed. 179 and *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] A C 776 P C

(*e*) *Blackbeard v Lendegren* (1786) 1 Cox Eq Cas 205, and see as to the use

**816** The old absolute rule that the contracts of a lunatic are void or voidable, possibly because it was found inconvenient as trade and commerce developed (*f*), has been modified by grafting on the rule certain exceptions —

(1) One exception arose from the principle that no man should be heard to stultify himself by pleading his own insanity (*g*). This principle has been much criticised (*h*) and was frequently ignored, evaded or modified (*i*) but it is now settled law that it is a good defence to an action upon a contract if it can be shown that the defendant was not of capacity to contract and that the plaintiff knew it (*j*).

Every person dealing with a lunatic with knowledge of his incapacity is deemed to perpetrate upon him a fraud which avoids the contract (*k*). The knowledge must be brought home to the contracting party (*l*) the burden of proving knowledge being on the lunatic (*m*) and evidence of the general reputation of the insanity of the person in the parish in which he resided is not sufficient (*n*).

Persons claiming through or under a lunatic stand in no better position than the lunatic whose act they seek to avoid (*o*), but are entitled to avoid what the lunatic might have avoided (*p*).

**SECT 1**  
**Contracts and Dispositions**

Exceptions to general rule  
Pleading one's own insanity

Party knowingly contracting with lunatic

Matters of record

of the word void *Mattheus v Baxter* (1873) L R 8 Exch 132 It seems that a contract by a lunatic may be confirmed by the court so as to be valid as from its date (*Baldwyn v Smith* [1900] 1 Ch 588) see p 400 *post* As to mortgages by a lunatic see note (*b*) p 338 *post* and title MORTGAGE

(*f*) See Bac Abr tit Idiots and Lunatics (F) and *Elliot v Ince* (1807) De G M & G 410 *per* Lord CRANWORTH L C at p 487

(*g*) *Anon* (1331) Y B 5 Edw 3 fo 70 *Anon* (1361) 35 Iib Ass pl 10 *Stroul v Marshall* (1590) Cro Eliz 398 *Cross v Andrews* (1598) Cro Eliz 622 This rule is accepted without qualification by Coke (Co Litt 247 a) and see *Beverly's Case* (1603) 4 Co Rep 123 b and Sugden on Powers 7th ed 179

(*h*) See *per* Lord HOLT O J in *Thompson v Leach* (1690) 3 Mod Rep 301 1 Story 13th ed 236

(*i*) *Yates v Boen* (1738) 2 Stra 1104 *Faulder v Silk* (1811) 3 Camp 128 *Gore v Gibson* (1840) 13 M & W 623 *Baxter v Portsmouth (Earl)* (1826) 5 B & C 170 *Brown v Jodrell* (1827) 3 C & P 30 *A G v Iarkhurst* (1668) 1 Cas in Ch 112 *Ridler v Ridler* (1729) 1 Eq Cas Abr 279 The rule was never extended to privies of the lunatic either by blood or by representation (*Beverley's Case supra*) and *quare* to privies in estate and tenure (*Thompson v Leach supra* S C as reported Carth 211 250 430 and compare *Beverley's Case supra*) nor to a person found idiot or non compos mentis by office at the King's suit (*Thompson v Leach supra* *Beverley's Case supra* *Tourson's Case* (1610) 8 Co Rep 170 a Co Litt 447 a)

(*j*) *Molton v Camroux* (1848) 2 Exch 487 501 affirmed (1849) 4 Exch 17 Ex Ch *Yates v Boen supra* *Drew v Nunn* (1879) 4 Q B D 661 O A *Grove v Johnston* (1890) 24 L R Ir 352 *Imperial Loan Co v Stone* [1892] 1 Q B 599 C A. As to evidence to prove knowledge of insanity see p 409 *post* As to breach of promise of marriage where supervening insanity is pleaded as a defence see title HUSBAND AND WIFE Vol XVI p 276

(*k*) *Wright v Froud* (1806) 13 Ves 136 *Lewis v Thomas* (1843) 3 Hare 26 compare *Manby v Beavelle* (1807) 3 K. & J 342 368 *Irce v Berrington* (1849) 7 Hare 394 402 *Faulder v Silk supra* *Baxter v Portsmouth (Earl) supra* *Hill v Gray* (1816) 1 Stark 434 *Browne v Jodrell* (1827) Mood & M 105 *Howard v Digby* (1834) 2 Cl & Fin 634 H L *Nottidge v Prince* (1860) 2 Giff 246 *Yates v Boen supra* *Drew v Nunn supra*

(*l*) *Niell v Morley* (1804) 9 Ves 478

(*m*) *Imperial Loan Co v Stone supra*

(*n*) *Greenslade v Dare* (1855) 20 Beav 284, but see *Beavan v M Donnell* (1854) 9 Exch 309 and see p 409 *post*

(*o*) *Molton v Camroux supra* *Price v Barrington* (1851) 3 Mac & G 486.

(*p*) *Elliot v Ince, supra*



## SECT 1

Contracts  
and Dis  
positionsMatters of  
recordContract in  
market overtContract  
where parties  
cannot be  
placed *in*  
*statu quo*Contract for  
necessariesWhat are  
necessaries

(2) Matters of record are not, as a rule, avoidable (*g*), even in the case of a lunatic so found (*r*). But this rule is frequently disregarded both at common law (*s*) and also in equity, where the court in the exercise of its ordinary jurisdiction will set aside any transaction which it deems inequitable (*t*).

(3) The sale or purchase by a lunatic in market overt is not avoidable (*a*).

(4) Where a person apparently of sound mind and not known to be otherwise, enters into a contract which is fair and *bona fide*, and the parties cannot be put *in statu quo*, the obligation will be enforced against the lunatic (*b*) so where a lunatic enters into a contract to purchase an estate and pays a deposit, a claim for the return of the deposit will be refused (*c*).

(5) In the case of a contract for necessaries a lunatic not so found may be under an obligation to pay for necessaries supplied to him (*d*), but only if the court is of opinion that the necessaries were provided with the intention on the part of the person making the provision of being paid for so doing (*e*). Necessaries include the common necessaries of life (*f*) having regard to the social

(*g*) *Beierley's Case* (1603) 4 Co Rep 123 b 3 Bac Abr tit Fines and Recoveries (C)

(*r*) *E g* a fine or recovery (Co Litt 247 a. *Lewing's Case* (1684) cited 10 Co Rep 42. *Mansfield's Case* (1614) 12 Co Rep 123 124. *Munley v Sherren* (1838) 8 Ad & El 704. *Hume v Burton* (1875) 1 Ridg Parl Rep 16 216. *Needler v Winchester (Bishop)* (1615) 110b 220).

(*a*) *Wentworth v Cholmley* (1744) cited 3 Atk 313. *Beverley's Case supra*. *Chamberlaine v Thorpe* (1590) Cro Eliz 187. *Hume v Burton supra*. *Thompson v Leach* (1690) 3 Mod Rep 301. *Stokes v Oliver* (1696) 5 Mod Rep 209. *Ex parte Roberts* (1746) 3 Atk 308. *Walcott Vouchee* (1828) 3 Bing 423.

(*t*) *Addison v Dawson* (1712) 2 Vern 618 compare also *Howard v Digby* (1834) 2 Cl & Fin 634 661 H L. *Ferris v Ferris* (1708) 2 Dq Cas Abi 695. *Coleby v Smith* (1683) 1 Vern 205. *Cartwright v Pultney* (1742) 2 Atk 380. *Baker v Irthard* (1742) 2 Atk 387. *Clerk v Clerk* (1700) 2 Vern 412. *Frank v Manuaring* (1839) 2 Beav 115.

(*a*) 2 Co Inst 713

(*b*) *Molou v Camroux* (1848) 2 Exch 487 (purchase of annuity). *Baxter v Portsmouth (Earl)* (1826) 5 B & C 170 (goods supplied). *Browne v Jodrell* (1827) Mood & M 105. *Price v Barrington* (1851) 3 Mac & G 486 (conveyance). *Elliot v Ince* (1857) 7 De G M & G 476 (sale and purchase see *per Lord Cranworth LC* at p 487). *Hassard v Smith* (1872) 6 I R Eq 429. *Beavan v M Donnell* (1804) 9 Exch 309 (deposit on purchase of real estate). *Moss v Tribe* (1862) 3 F & F 297. *Barrow v Barrow* (1774) 2 Dick 504 (marriage settlement). *Drew v Nunn* (1879) 4 Q B D 661 O A (goods supplied). There appears to have been some doubt at one time whether the proposition applied to mortgages by a lunatic (*Snook v Watts* (1848) 11 Beav 105. *Jacobs v Richards*. *Jacobs v Porter* (1804) 18 Beav 300. 5 De G M & G 55 O A.) but it is conceived that it would (*Campbell v Hooper* (1855) 1 Jur (N S) 670 and see *Kirkwall v Flight* (1840) 3 W R 529).

(*c*) *Beavan v M Donnell supra*

(*d*) *Wentworth v Tubb* (1841) 1 Y & C Ch Cas 171. *Baxter v Portsmouth (Earl) supra*. *Manby v Scott* (1863) 1 Sid 112 Ex Ch. *Dane v Kirkwall (Viscountess)* (1838) 8 O & P 679. *Ex parte Hall* (1802), 7 Ves 261. *Nelson v Duncombe, Duncombe v Nelson* (1846) 9 Beav 211. *Howard v Digby supra*, *Carter v Beard* (1839), 10 Sim 7, *Chappell v Nunn* (1879) 4 L R Ir 316. *Re Weaver* (1882) 21 Ch D 615 O A. *Re Rhodes Rhodes v Rhodes* (1889), 44 Ch D 94 O A., *Wankle v Bailey* [1897] 1 Ch 123.

(*e*) *Re Rhodes Rhodes v Rhodes supra*, doubting *Carter v Beard, supra*.

(*f*) *Peters v Fleming* (1840) 6 M & W 42. *Wharton v Mackenzie, Crepps*

## PART II — CIVIL CAPACITY

### SECT I Contracts and Dis- positions

status of the lunatic (*g*) The term has been extended so as to include costs incurred in obtaining a commission in lunacy (*h*) even when the alleged lunatic was found to be of sound mind (*i*), or in resisting a commission (*h*) It also includes necessities supplied to the lunatic's wife (*l*) as well as moneys advanced to her for necessities though she had a separate income (*m*) but the authority of a wife to pledge her husband's credit is no greater in the case of a lunatic than in the ordinary case of husband and wife (*n*) Where a husband was confined in an asylum but no committee was appointed it was held that he could on his release recover moneys belonging to him which had been expended in the maintenance of his children (*o*)

Supplies to  
wife and  
children

(6) The acts during a lucid interval of a lunatic who has not yet been so found by inquisition are valid whether the person dealing with him has notice of his lunacy or not (*p*) Thus deeds executed by a lunatic though confined in an asylum at the time and even under restraint may be valid (*q*) as also deeds executed before but in expectation of insanity (*r*)

Acts during  
lucid interval

Where a person has been found lunatic by inquisition so long as the inquisition has not been superseded he cannot even during a lucid interval execute a valid deed dealing with or disposing of his property such a deed is entirely null and void (*a*)

None valid by  
lunatic so  
found

*v* *Hill* (1844) 5 Q. B. 606 611 *Ryder v. Wombwell* (1865) 1 L. R. 4 Exch. 52 Ex. Ch.

(*g*) *Re Rhodes Rhodes v. Rhodes* (1859) 44 Ch. D. 94 C. A. *Re J* (a Person of Unsound Mind) [1909] 1 Ch. 574 C. A.

(*h*) *Williams v. Wentworth* (1842) 5 Per. 525 *Re Cumming* (a Lunatic Deceased) (1884) 5 De G. M. & G. 30 C. A. *Re Rutter* *Crest v. Rolfe* (1803) 23 L. J. (Ch.) 235 C. A. *Stedman v. Hart* (1804) 23 L. J. (Ch.) 908 *Brickwell v. Lullo* (1889) 22 Q. B. D. 567 C. A.

(*i*) *Nelson v. Duncombe Duncombe v. Nelson* (1846) 9 Beav. 211 *Ex parte a Lunatic Ex parte Hill* (1813) Coop. G. 54 *Wentworth v. Tubb* (1841) 1 Y. & C. Ch. Cas. 171

(*k*) *Wentworth v. Tubb supra*

(*l*) *Read v. Legard* (1851) 6 Exch. 636

(*m*) *Re Wood's Estate Davison v. Wood* (1963) 1 De G. J. & Sm. 460 C. A. and see title HUSBAND AND WIFE Vol. XVI p. 473

(*n*) *Richardson v. Du Bois* (1869) 1 R. 5 Q. B. 51 *Chapell v. Nunn* (1879) 4 L. R. Ir. 316 *Drew v. Nunn* (1819) 4 Q. B. D. 661 C. A. see also as to criminal lunatics *Re J* (a Person of Unsound Mind) *supra* As to the authority of a wife to bind her husband see generally title HUSBAND AND WIFE Vol. XVI pp. 417 *et seq.*

(*o*) *Healing v. Healing* (1902) 51 W. B. 221

(*p*) *Beverley's Case* (1603) 4 Co. Rep. 123 b 125 a *A. G. v. Lanthier* (1819) 3 Bro. C. C. 441 *Selby v. Jackson* (1843) 6 Beav. 192 and see *Burkin v. Wing* (1890) 63 L. T. 80

(*q*) *Selby v. Jackson supra*

(*r*) *Faulder v. Silk* (1811) cited in *Touart v. Sellars* (1811) 5 Dow. 231 236 H. L.

(*a*) *Re Walker* (a Lunatic so Found) [1905] 1 Ch. 160 C. A. *Ex parte Wright* (*Sir Benjamin*) (1883) 1 Vern. 150 See also title DEEDS AND OTHER INSTRUMENTS Vol. X pp. 359 360 He can however make a will during a lucid interval (see p. 403 *post*) Where a person who has entered into a contract for the sale of property is subsequently found a lunatic with lucid intervals as from a date prior to the contract the court will direct an issue whether the contract was executed during a lucid interval (*Hall v. Warren* (1804) 9 Ves. 600 see *Owen v. Davies* (1748) 1 Ves. Sen. 82 *Pegge v. Skynner and Richardson* (1781)

## SECT 1

**Contracts and Dispositions**

Direction to  
committee to  
perform  
contract

Transactions  
must be fair  
and *bonâ fide*

Voluntary  
dispositions

**817** The judge in lunacy may direct the committee to perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy (*b*) and a covenant to execute a power by a person who subsequently becomes insane will be enforced (*c*)

**818** Every transaction with a lunatic even where the person dealing with him has no notice of the lunacy must in order to be upheld be fair and *bonâ fide* (*d*) and this rule extends to persons of weak understanding who can be easily or unduly influenced as well as to lunatics (*e*)

**819** Any disposition made by a lunatic without valuable consideration will be set aside even against subsequent purchasers for valuable consideration without notice (*f*)

## SUI SLCR — Insurance

Disclosure of  
fact of lunacy

**820** On insuring the life of a lunatic the fact of his lunacy should be disclosed especially if the lunacy is of such a kind as to affect his bodily health (*g*)

Effect of  
suicide upon  
life insurance

**821** It is settled law that where a person who has insured his life dies a *felâ de se* public policy avoids the contract in consequence of the death being occasioned by his own criminal act (*h*) but where the act of suicide takes place when the assured is insane then whether he be beneficially interested in the insurance or not and in the absence of any special condition the policy is not avoided (*i*) Similarly where a condition supporting the insurance in the event of the suicide of the assured he being at the date of the act beneficially interested in the policy and of sound mind,

1 Cox Eq Cas 23 and *Kirwall v Wright* (1842) 3 W R 429 where a purchaser is found lunatic subsequently to the date of the contract as from a date prior to the contract the court will declare the contract null and void and order the costs and expenses of the vendor to be taxed and deducted from the deposit made on the purchase and the residue to be paid to the committee of the lunatic's estate (*1 et v Bevan* (1853) 22 L J (CH) 636)

(*b*) Lunacy Act 1890 (33 & 34 Vict c 5) s 170 (*i*) and compare *Re Iqani (a Person of Unsound Mind) Re Iqani's Trust* [1892] 1 Ch 236 C A (where a vesting order was made)

(*c*) *Affleck v Affleck* (1857) 3 Sm & G 394

(*d*) 1 Story 13th ed 42 249 *Blachford v Christian* (1829) 1 Knapp 73 7th P C *Clarison v Hanway* (1820) 2 P Wms 203 *Gartside v Isherwood* (1783) 1 Bro C C 561 *Hassard v Smith* (1872) 6 I R Eq 429

(*e*) 1 Story 13th ed 205 *Osmond v Fitzroy* (1831) 3 P Wms 129 *Fox v Mackreth* 1 Atk v *Mackreth* (1791) 1 Bro C C 400 2 White & Tud L C 7th ed 709 *Huguenin v Bascley* (1807) 14 Ves 273 *Natidge v Prince* (1860) 2 Giff 246 *Lyon v Home* (1866) 1 P 6 Eq 655 *Morley v Loughnan* [1893] 1 Ch 26

(*f*) *Clark v Clark* (1700) 2 Vern 412 (settlement) *Fillot v Ince* (1801) 7 De G M & G 475 (de entailng decd) *Sentance v Poole* (1821) 3 O & P 1 (promissory note) *Manning v Gull* (1812) L R 13 Eq 485 (voluntary deed) See also title GIFTS Vol XV p 403 As to wills see pp 403 *et seq post*

(*g*) *Lindenau v Desborough* (1828) 3 Man & Ry (K B) 40 As to the duty to disclose material facts on making a proposal for life insurance, see title INSURANCE Vol XVII pp 550 *et seq*

(*h*) *Amicable Society v Bland* (1830) 4 Pl (N S) 194 H L

(*i*) *Horn v Anglo-Australian and Universal Life Assurance Co* (1861) 30 L J (CH) 511

is void (*k*) it is conceived that a condition supporting the insurance in the event of suicide while under the influence of insanity and whether the assured was or was not beneficially interested in the policy would not be void. Where a policy contains a condition avoiding the policy in the event of the assured committing suicide or dying by his own hand the condition applies although the assured takes his life while in a state of insanity the moral condition of mind not being material in such case (*l*)

SECT. I  
Contracts  
and Dis-  
positions

Application  
of special  
conditions

### SUB SECT. 3 — Marriage

**822** Marriage with a lunatic so found by inquisition is null and void to all intents and purposes whatsoever even though celebrated during a lucid interval (*m*)

Of lunatic so  
found

**823** In the case of a lunatic not so found by inquisition marriage like other civil contracts will be invalidated by want of consent of capable persons (*n*) and this disability of the party makes the contract void *ab initio* and not merely voidable (*o*) and therefore no sentence of avoidance is necessary (*p*)

Of lunatic not  
so found

**824** The fact of mental incapacity at the time of the marriage must be established by evidence everything being presumed in favour of the marriage (*q*) and the validity of the marriage is decided by the capacity of the party at the actual time of marriage and not by his state of mind before or after (*r*)

Evidence of  
incapacity

**825** In considering the question as to the degree of mental incapacity which will invalidate such a marriage it is necessary to distinguish between (1) incapacity arising from actual insanity and (2) mere dullness of intellect (*s*)

(1) The incapacity arising from actual insanity must be such that the party was incapable of understanding the nature of the

Degree of  
incapacity

(*k*) *Amicable Society v. Lolland* (1830) 4 Bl. (N. S.) 194 II I see further title INSURANCE Vol XVII p. 556

(*l*) *Borradaile v. Hunter* (1843) 5 Man. & G. 659 *Clift v. Schwabe* (1846) C. B. 437 *Dufaut v. Professional Life Assurance Co.* (1856) 20 Beav. 599

(*m*) Marriage of Lunatics Act 1511 (ol. Geo. 3 c. 37) *Turner v. Meyers* (*falsely called Turner*) (1808) 1 Hag. Con. 411 417 title HUSBAND AND WIFE Vol XVI p. 282 as to the common law see 1 Bl. Com. 434 and *Stiles v. West* (1605) 1 Poll. Abr. 357 Sheppard Abridgment tit. Idiot Har. Co. Litt. 80 a n. (1) 30 b n. (2) Bac. Abr. tit. Idiots and Lunatics (D) As to contempt of court in marrying a lunatic so found see title CONTUMPT OR COUPD'ARTACHMENT AND COMMITTAL Vol VII p. 29

(*n*) *Turner v. Meyers* (*falsely called Turner*) *supra* *Portsmouth (Countess) v. Portsmouth (Earl)* (1818) 1 Hag. 1 cc. 35, 359 *Browning v. Reane* (1812) 1 Phillim. 69 *Hancock v. Leaty* (1856) L. R. 1 P. & D. 335

(*o*) *Harford v. Morris* (1862) 2 Hag. Con. 423 425

(*p*) *Elliot v. Gurr* (1812) 2 Phillim. 16 19 As to proceedings for nullity on the ground of lunacy see title HUSBAND AND WIFE Vol XVI pp. 469 *et seq.*

(*q*) *Portsmouth (Countess) v. Portsmouth (Earl)* *supra* *Harrod v. Harrod* (1854) 1 K. & J. 4

(*r*) *Larker v. Larker* (1801) 2 Lee 352 *Ex parte Ferns* (1801) 5 Ves. 832 *Lillis v. Bowman* (1801) 1 L. T. (O. S.) 10 *Leggett v. O'Brien* (1834) Milw. 325 334 *Hancock v. Leaty* *supra* Similarly the fact that one of the parties was of unsound mind before promise made is no defence to an action for breach of promise of marriage (*s*) *Baker v. Cartwright* (1861) 30 L. J. (O. R.) 364

(*s*) *Harrod v. Hancock* *supra*

**SECT 1**  
**Contracts**  
**and Dis**  
**positions**

contract and the duties and responsibilities which it creates (a), or of taking care of his own person or property (b)

(2) Weakness of intellect is distinguished from actual insanity is not a sufficient ground for invalidating a marriage unless fraud is also proved (c) and where fraud is clearly proved weakness of mind may be presumed from the tender years of the party (d)

**Parties to**  
**proceedings to**  
**set aside**  
**marriage**

**826** Proceedings to set aside a marriage on the ground of the insanity of one of the contracting parties may be brought (1) by the contracting party upon recovery and if the contracting party having recovered take no steps to invalidate the marriage no one can institute such proceedings on his behalf (e) (2) where the contracting party is a lunatic so found by inquisition by his committee (f) (3) where the contracting party is a minor or a lunatic not so found by inquisition by a guardian duly appointed for the purpose (g) (4) where the contracting party is dead, by any person having an interest in the matter (h)

**Effect of**  
**insanity**  
**subsequent to**  
**marriage**

**827** Where marriage has once been validly contracted, the usual incidents belonging to it attach and continue notwithstanding the subsequent insanity of either party nor will such insanity operate as a dissolution of the bond nor afford a ground for a decree of dissolution of the marriage or of judicial separation (i) Thus, the liability of a husband for the maintenance of his wife is not removed by his or her becoming lunatic (k)

**As a defence**  
**to charges of**  
**misconduct**

Insanity arising during the marriage state will be an answer to many charges of misconduct (l) but the misconduct must be the consequence of the insanity (m) and in order to make insanity a good plea to a petition for a divorce the plea should state that the insanity is lasting and abiding and without hope of recovery (n)

(a) *Durham v Durham* (1850) 10 L D 80 and see the judgment of HANNEN J in *Hancock v Peaty* (1867) L R 1 P & D 135

(b) *Browning v Reane* (1812) 2 Phillim 69 and compare *Turner v Meyers* (falsely called *Turner*) (1808) 1 Hag Con 414 417

(c) *Portsmouth (Countess) v Portsmouth (Earl)* (1828) 1 Hag Ecc 355 359 *Hartford v Morris* (1866) 2 Hag Con 423 425 and see *Fust v Bowerman* (1790) 2 Hag Con 406 n *Hull v Hull* falsely called *M Arthur* (1851) 15 Jur 710

(d) *Hartford v Morris* *supra*

(e) *Turner v Meyers* (falsely called *Turner*) *supra* and see *Hancock v Peaty* *supra*

(f) *Portsmouth (Countess) v Portsmouth (Earl)* *supra* *Fust v Bowerman* *supra* *Parnell v Parnell* (1814) 2 Hag Con 169 *Woodgate v Taylor* (1861) 30 L J (P & A) 111

(g) *Mordaunt v Mordaunt* (1671) L R 2 Sc & Div 374 *Fust v Bowerman* *supra* *Hancock v Peaty* *supra* compare *Fry v Fry* (1890) 15 P D 20 C A and *Giles v Giles* [1900] P 17 and see title INFANTS AND CHILDREN, Vol XVII pp 134 *et seq*

(h) *Browning v Reane* *supra* *Farler v Parler* (1707) 2 Lee 382 and see title HUSBAND AND WIFE Vol XVI p 470

(i) *Hayward v Hayward* (1805) 1 Sw & Tr 81 *Hall v Hall* (1864) 3 Sw & Tr 247, compare title HUSBAND AND WIFE Vol XVI pp 476 484

(k) *Froche v Barry* (1813) 2 Ves & B 56

(l) *Hall v Hall* *supra* *Hanbury v Hanbury* [1892] P 222 and see *Yarrow v Yarrow* [1892] P 92

(m) *White v White* (1808) 1 Sw & Tr 592 *Curtis v Curtis* (1808) 1 Sw & Tr 192 213 *Marsh v Marsh* (1858) 1 Sw & Tr 312

(n) *Hanbury v Hanbury* *supra* and see *Yarrow v Yarrow* *supra* and title HUSBAND AND WIFE, Vol XVI p 476

SECT 2 — *Torts*

SECT 2

Torts

**828** Though there is no reported instance of an action of tort ever being brought in this country against a lunatic (*o*) it would seem that according to the old common law lunacy was no defence to such an action (*p*), and it is clear that the doctrine that no man may stultify himself by pleading his own incapacity would apply as well to an action of tort as to an action of contract (*q*). But it is conceived that insanity would now be held to be a defence to an action of tort if it could be proved that the person committing the wrong was not competent by reason of mental infirmity to understand the nature and consequences of the act which he was doing (*r*).

Insanity as a defence to tort

SECT 3 — *Wills*

**829** In order that a will should be valid it is requisite that the testator should have at the time when he makes his will a reasonable memory and understanding to dispose of his estate (*s*). So the will of an idiot is void (*t*), as is the will of one deaf and dumb from his nativity he being in presumption of law an idiot (*a*) though the presumption may be rebutted (*b*). The will of a lunatic made during his insanity is void (*c*) and where an insane person purports to make a will letters of administration will be granted as in the case of intestacy (*d*), but the will of a lunatic, whether so found or not, made during a lucid interval is valid (*e*). Mental imbecility arising from advanced age or produced by excessive drinking or any other cause may destroy testamentary power (*f*). Shortly it is essential to the exercise of the testamentary power that a testator should understand the nature of the act and its effect, and that no insane delusions should dominate his mind so as to overmaster his judgment to such an extent as to

Requisites to validity

Will of an idiot

Will of a lunatic

Will made during lucid interval

(*o*) Clerk and Lindsell *Law of Torts* 5th ed. 48

(*p*) *Weaver v Ward* (1616) Hob 134 Bac Abr tit Trespass (G I) and see *Haycraft v Cressy* (1801) 2 East 92 per Lord KENYON C J at p 104

(*q*) *Cross v Andrews* (1598) Cro Eliz 622 scep 397 ante and see *Mordaunt v Mordaunt* (1870) L R 2 P & D 103 per KELLY C B at p 142

(*r*) *Hanbury v Hanbury* (1892) 8 T I R 559 C A per Lord ESHER M R at p 560 and see *Emmens v Pottle* (1885) 16 Q B D 354 356 C A

(*s*) *Shep Touch* (ed Preston) 403 *Winchester's (Marquis) Case* (1599) 6 Co Rep 23 *Banks v Goodfellow* (1810) 1 R o Q B 549 *Jenkins v Morris* (1880) 14 Ch D 674 C A *Murfett v Smith* (1887) 2 P D 116 *Hope v Campbell* [1899] A C 1

(*t*) Bac Abr tits Idiots and Lunatics (F) Wills (B 12)

(*a*) *Swinburne on Wills* Part II s 4 pl 2 s 10 pl 2 *In the Goods of Owston* (1862) 2 Sw & Tr 461 *In the Goods of Geale* (1864) 3 Sw & Tr 431

(*b*) *Ibid* *Dickenson v Blisset* (1754) 1 Dick 268

(*c*) *Swinburne on Wills* Part II, s 3

(*d*) *In the Goods of Rich* [1892] P 143

(*e*) *Swinburne on Wills* Part II s 3 pl 4 *Hall v Warren* (1804), 9 Ves 610 *Hodg v Lewis* (1755) 2 Lee 176, *Cartwright v Cartwright* (1793) 1 Phillim 90 100 *Bannatyne v Bannatyne* (1852) 16 Jur 864 *Re Walker (a Lunatic so Found)* [1905] 1 Ch 160 172 C A

(*f*) *Ex parte Cranmer* (1806) 12 Ves 445 452 *Sherwood v Sanderson* (1815) 19 Ves 280 283 *Ridgeway v Darwin* (1802) 8 Ves 65 *Griffiths v Robins* (1818), 3 Madd 191 *Mackenzie v Handasyde* (1829) 2 Hag L c 211 and see *Ayrey v Hall* (1824) 2 Add 206 209 210

## SMOT 3

## Wills

Effect of  
subsequent  
recovery

Partial  
validity

render him incapable of making a reasonable and proper disposition of his property or of taking a rational view of the matters to be considered in making a will (g)

The sound and disposing mind and memory must exist at the actual moment of execution (h), and a will executed during insanity does not become valid by the subsequent recovery of the testator (i)

Part of a will may be established and part held not entitled to probate if incapacity be shown at the time of execution of the latter part (l)

Admissibility  
of evidence to  
prove true  
expression of  
intent

**830** Where the sanity of a testator is in question parol or documentary evidence will be admitted to show that the will expresses the deliberate intention of the testator. All statements, whether verbal or in writing, of a testator preparatory to making a will and his conduct generally in relation thereto are of importance to show whether in fact the testator was aware of the character of the act he was performing (l). A will of a testator being in his own handwriting and affirmed and delivered by him affords strong evidence of his capacity to make a will (m). The evidence of an attesting witness impeaching the will inasmuch as he thereby impeaches his own act though admissible, must be received with scrupulous jealousy (n), and is not to be relied on unless corroborated by other evidence (o)

Effect of  
existence of  
fiduciary  
relationship  
between  
testator and  
beneficiary

**831** The existence of certain intimate or confidential relations between a testator and a person benefited by his will renders it particularly necessary to prove that the testator was capable of making a will (p). Such are the relations of medical man and patient (q), parent and child (r), child and parent (s), husband and wife (t),

(g) *Banks v Goodfellow* (1870) L R 5 Q B 549 *Hope v Campbell* [1899] A C 1

(h) *Billinghurst v Vickers* (1810) 1 Phillm 187 *Wood v Wood* (1811) 1 Phillm 357 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 178

(i) *Arthur v Bokenham* (1708) 11 Mod Rep 148 157 Shep Touch (ed Preston) 413

(k) *Lrouncker v Lrouncker* (1812) 2 Phillm 57

(l) *Hall v Warren* (1804) 9 Ves 605 610 *Levy v Lindo* (1817) 3 Mer 81 *Ulmer v Gott* (1714) 4 Bro Parl Cas 230 *Fane v Devonshire (Duke)* (1719) 6 Bro Parl Cas 137 *Wheeler v Alderson* (1831) 3 Hag Lcc 514 *Butlin v Barry* (1837) 1 Curt 614 629 *Durling v Loveland* (1839) 2 Curt 225

(m) *Cartwright v Cartwright* (1793) 1 Phillm 90 100 see also *Rutherford v Maule* (1832) 4 Hag Ecc 213 226 and *Clarke v Lear* (1791) cited 1 Phillm 119

(n) *Bootle v Blundell* (1815) 19 Ves 494 504 *Howard v Brasthwaite* (1812) 1 Ves & B 202

(o) *Kinleside v Harrison* (1818) 2 Phillm 449 499 compare *Burrowes v Lock* (1805) 10 Ves 470 473 *Young v Richards* (1839) 2 Curt 371 *Pennant v Kingscote* (1843) 3 Curt 642 *Hudson's Case* (1682) Skin 79 *Dagg's Case* (undated) cited Skin 79

(p) *Segrave v Arwan* (1878) Beat 157 166 *Bulkley v Walford* (1834) 8 Bl (N S) 111 H L *Butlin v Barry* supra *Durling v Loveland* supra see also title FRAUDULENT AND VOIDABLE CONVEYANCES Vol XV p 107

*Popham v Brooke* (1528) 5 Russ 9

*Wright v Vanderplank* (1855) 2 K & J 1

*Mackenzie v Handasyde* (1829) 2 Hag Ecc 211

*Myrton v Robinson* (1828) 2 Hag Ecc 169 179 *Moss v Brander* (1811) 1

## SECT 3

## Wills

or of other  
circumstances  
raising pre-  
sumption of  
impropriety

wife and husband (a), spiritual adviser and penitent (b), and more especially legal adviser and client (c). Still stricter proof is required where there is some weakness in the testator which, though not amounting to incapacity, renders him liable to be made the instrument of those around him (d) or where the testator is of extreme age (e), or it is alleged that the will was prepared or obtained by or through a person benefited thereby (f) especially where that person was the legal medical, or spiritual adviser of the testator or was in some other position of influence towards him (g), or where knowledge of the contents of the will was not brought home to him (h) or the will was prepared on verbal instructions only (i) or where there was any concealment or misrepresentation (k), or where the will is at variance with the known affections of the testator (l) or his previous declarations (m) or his dispositions in former wills (n), or a general sense of propriety (o) or has been clandestinely obtained or where there is evidence that the will has been obtained by force (p) or by intimidation (q) or by importunity (r) or has been made by interrogatories (s) or has been prepared by (t) or on the instructions of a legatee (u).

Phillim 254 *Baker v Batt* (1838) 2 Moo P C C 317 *Marsh v Tyrrell* (1828) 2 Hag Ecc 84

(a) *Haeler v Newborn* (1654) Sty 427 *Williams v Goude* (1828) 1 Hag Ecc 217 *Hawood v Baker* (1840) 3 Moo P C C 282 290

(b) *Middleton v Sherburne* (1841) 4 Y & C (ex) 356 compare *Huguennin v Baseley* (1807) 14 Ves 273

(c) *Segrave v Kirwan* (1828) Beat 107 166 *Marcabe v Hussey* (1831) 2 Dow & Cl 440 H L *Ingram v Wyatt* (1828) 1 Hag Ecc 384 *Wyatt v Ingram* (1832) 3 H L Ecc 466 *Haworth v Marriott* (1833) 1 M & K 643 *Dufaur v Croft* (1840) 3 Moo P C C 136 *Fowell v Fowell* [1900] 1 Ch 243 *Willis v Barron* [1902] A C 271 *Wright v Carter* [1903] 1 Ch 27 C A

(d) *Ingram v Wyatt supra* *Donegal's (1<sup>st</sup>) Case* (1751) 2 Ves Sen 407 *Mountain v Bennet* (1887) 1 Cox Eq Cas 303

(e) *Kinleside v Harrison* (1816) 2 Phillim 449 499 *Graffiths v Robins* (1818) 3 Madd 191

(f) *Bullinghurst v Vickers* (1810) 2 Phillim 193 *Mackenzie v Handasyde* (1829) 2 Hag Ecc 211

(g) *Popham v Brooke* (1828) 5 Russ 9 *Middleton v Sherburne supra* *Huguennin v Baseley supra* *Segrave v Kirwan supra* *Ingram v Wyatt supra*

(h) *Laske v Ollat* (1815) 2 Phillim 323

(i) *Middleton v Forbes* (1778) cited 1 Hag Ecc 395 398 *Mackenzie v Handasyde supra*

(k) *Segrave v Kirwan supra* *Allen v M Pherson* (1847) 1 H L Cas 191 207

(l) *King v Farley* (1828) 1 Hag Ecc 502 *Brylges v King* (1828) 1 Hag Ecc 256 *Coghlan's Case* (undated) cited in *Bootle v Blundell* (1815) 19 Ves 494 508

(m) *Baker v Batt supra* *Marsh v Tyrrell supra* *Brydges v King supra*

(n) *Myrn v Robinson* (1826) 2 Hag Ecc 169 179 *Brydges v King supra*

(o) *Butlin v Barry* (1837) 1 Curt 614 629 *Durling v Loveland* (1839) 2 Curt 225

(p) *Macenzie v Handasyde supra* *Paske v Ollat supra* *Wyatt v Ingram supra* *Mountain v Bennet supra*

(q) *Swinburne on Wills Part VII s 2* *Nelson v Oldfield* (1688) 2 Vern 76

(r) *Constable v Tufnell* (1803) 4 Hag Ecc 460 477

(s) *Green v Skipworth* (1809) 1 Phillim 53

(t) *Paske v Ollat supra*

(u) *Dodge v Meech* (1828) 1 Hag Ecc 612



## SECT 4

## Miscellaneous

## Agency

## SECT 4—Miscellaneous

**832** A lunatic cannot effectively appoint an agent (*v*), and an agency created during sanity will be determined by the lunacy of the principal or agent (*w*)

**833** Other instances of incapacity on the part of a lunatic are dealt with elsewhere (*x*)

## Part III—Evidence of Insanity

## SECT 1—As to the Issues

## On an inquiry

**834** On an inquiry the issue (*a*) to be tried is whether the alleged lunatic is of unsound mind so as to be incapable of managing himself or his affairs (*b*)

## At common law and in Chancery

**835** In an action at common law or in Chancery, where the responsibility of an alleged lunatic is in question the issue generally directed is Was the alleged lunatic at the date in question capable of understanding the nature of the act he was performing? (*c*)

## In a probate action

In a probate action where the sanity of a testator is in question the issue is, Was the testator of a sound and disposing mind? (*d*) that is was he able to understand the nature of the act and its effect, the extent of the property of which he was disposing, and the claims to which he ought to give effect (*e*)

## In criminal proceedings

In criminal proceedings the issue is 'Was the prisoner at the time of committing the act labouring under such a defect of reason from disease of the mind as not to know the quality of the act which he was doing or if he did know it, did he know that what he was doing was wrong?' (*f*)

(*v*) See title AGENCY Vol I p 150 In a proper case an inquiry may be ordered as to the competency of a plaintiff to retain a solicitor (*Pomery v Pomery* [1909] W N 156)

(*w*) See title AGENCY Vol I pp 23 234 and see *Fore Street Warehouse Co v Durrant* (1883) 10 Q. B. D. 471 474 *Longe v Toynbee* [1910] 1 K B 215 C. A. (cases as to solicitor's retainer)

(*x*) As to change of domicile of a lunatic see title CONFLICT OF LAWS Vol VI p 192 as to his incapacity to present to an advowson see title ECCLESIASTICAL LAW Vol XI p 574 as to the effect of lunacy upon the holding of a benefice see *ibid* p 642 as to the lunacy of a dean or canon see *ibid* p 482 and as to the lunacy of a bishop see *ibid* p 407 as to the incapacity of a lunatic to vote at an election see title ELECTIONS Vol XII pp 140 164 as to his incapacity to sit in Parliament see title PARLIAMENT

(*a*) This part of the title is confined to evidence in connection with the proof of lunacy As to the competency of lunatics and idiots themselves to give evidence see title EVIDENCE Vol XIII p 569

(*b*) Lunacy Act 1890 (53 & 54 Vict c 5) ss 94, 98 As to confining the inquiry to this issue see further p 421 *post*

(*c*) *Mannin d Ball v Ball* (1829) Sm & Bat 183 454

(*d*) See p 403 *ante*

(*e*) *Banks v Goodfellow* (1870) L R 5 Q. B. 549 compare *Boughton v Knight* (1873) L R 3 P & D 64 and see title EXECUTORS AND ADMINISTRATORS Vol XIV p 178

(*f*) *Macnaughten's Case* (1843) 8 Scott (N R), 600—603 and see title CRIMINAL LAW AND PROCEDURE Vol IX p 241

SECT 2—*Presumptions*

## SECT 2

Presump-  
tionsPresumption  
of sanityBurden of  
proof in pro-  
bate action

**836** Every man is presumed to be sane until the contrary is proved, and this presumption holds as well in civil as in criminal cases (g) But in the case of a will it is the duty of the executors or any other person setting up the will to show that it is the act of a competent testator Therefore where any dispute or doubt exists as to the capacity of a testator, his sanity must be proved affirmatively (h) Similarly where a duly executed will has been revoked, the competence of the testator to revoke it must be proved (i)

Again where a man has been proved or is admitted to have been insane the law presumes such insanity to continue until it is proved to have ceased and the burden of proving recovery or a lucid interval as the case may be lies on the person alleging the same (k) The evidence to prove a recovery or a lucid interval must be as strong and demonstrative of the fact as when the object is to prove insanity (l)

Presumption  
as to con-  
tinuance of  
insanity

An idiot is presumed to be incurable lunacy is always presumed to be curable (m)

Idiocy and  
lunacy

Although at common law a lunatic was always presumed to be capable of recovering his reason nevertheless in cases where the evidence admitted has shown that there was no probability of recovery the court has dealt with the lunatics properly for the benefit of persons other than the lunatic in a way which would not otherwise have been adopted (n) but the practice is rather to be narrowed than extended (o)

Evidence as  
to inability to  
recover  
reason

Where a long time has elapsed since the occurrence of an act which it is desired to impeach on the ground of insanity, the court will uphold the act in the absence of strong and cogent evidence

Lapse of  
time since  
occurrence  
of act

(g) 1 Hale P C 33 4 G v Paranthor (1792) 1 Pro C C 441 *Wile v Wilson* (1806) 13 Ves 81 85 *Steel v Calley* (1800) 1 Keen 620 *Snell v Watts* (1848) 11 Beav 100 *Creagh v Flood* (1845) 8 I Eq R 434 *Macnaughten's Case* (1843) 8 Scott (N R) 600—601

(h) *Sutton v Sidler* (1807) 3 C B (N S) 87 *Symes v Green* (1809) 1 Sw & Tr 401 *Smee v Smee* (1879) 5 P D 94 and see *Harris v Inglethorpe* (1851) 5 P Wms 91 93 *Wallis v Hodgson* (1740) 2 Atk 56 *Opie v Cliche* (1745) 1 Ves Sen 176 *Townsend v Tice* (1718) 1 Wils 216 *Bottle v Blundell* (1811) 19 Ves 494 500 *Latham v Wright* (1831) 2 Russ & M 1 13 14 15

(i) *Harris v Berrall* (1808) 1 Sw & L 103 *Sprigge v Sprigge* (1868) L R 1 P & D 608 *Benson v Benson* (1800) L R 2 P & D 1 2 1 6

(k) A G v Paranthor *supra* *White v Wilson* *supra* *Frank v Mann* (1839) 2 Beav 110 *Snell v Watts* *supra* *Hassard v Smith* (1812) 6 I 1 Eq 429 *Prinsep and East India Co v Dyce Sombre* (1856) 10 Moo P C 232 239 244, *Cartwright v Cartwright* (1793) 1 Phillm 90 100 *White v Driver* (1809) 1 Phillm 84 88 *Groom v Thomas* (1829) 2 Hag Ecc 433 *Waring v Waring* (1848) 6 Moo P C C 341 *Grimm v Droper* (1848) 6 Notes of Cases 418 *John v Blane* (1848) 6 Notes of Cases 442 *Fowles v Davidson* (1848) 6 Notes of Cases 461 474

(l) A G v Paranthor *supra*

(m) 1 Bl Com 302 and see *Pe Irregard a Lunatic* (1805) 2 Sch & Lef 432 438 *Re Hindu Ex parte Whitbread* (1816) 2 Mer 91 102 As to the distinction between lunatics and idiots see further p 39, *ant*

(n) *Re Hindu Ex parte Whitbread* *supra* *Re Blair, a Lunatic* (1836) 1 My & Cr 500 *Re Clarke a Lunatic* (1847) 2 Ph 281 *Le Croft* (1862) 12 L J (ex) 481 C A *Pe Frost* (1870) 5 Ch App 639

(o) *Re Evans (a Person of Unsound Mind)* (1882), 21 Ch D 29, C A

**SECT 2**  
**Presump-**  
**tions**

to the contrary (*p*) Similarly, in the absence of evidence to the contrary it will be presumed that a person who has prepared or attested the deed of an alleged lunatic and has since died would if available as a witness, have sworn that the alleged lunatic was of sound mind at the date of the execution of the deed (*q*)

**SECT 3 — Admissibility of Evidence**

**SUB SECT 1 — In General**

Evidence  
of conduct  
before and  
after critical  
time

**837** Evidence as to the conduct of the alleged lunatic at the time when the state of his mind is in dispute is most important and material but evidence of his conduct before and after that time is admissible (*r*) though it carries but little weight against satisfactory evidence of his state of mind at the critical time (*s*)

Where in civil proceedings an act is alleged to be the act of a lunatic the fact that the act and the manner of doing it is rational is strong presumptive evidence of the sanity of the doer at the time of the act even where he is under confinement as a lunatic (*b*) and in this connection the spontaneity of the act and its accord with natural affection and moral duty and its conformity to past and subsequent declarations of intention are of importance (*c*)

Where the chief or only evidence of insanity is to be derived from the nature of the act in question such act must bear strong internal indications of irrationality to afford any presumption of the insanity of the doer (*d*)

Effect of  
nature of  
disease

The value of the evidence relating to the alleged lunatic's conduct before and after the critical time varies materially in accordance with the nature of the mental disease from which he is or is alleged

(*p*) *Touart v Sellars* (1814) 5 Dow 231 236 237 11 L compare *Price v Berrington* (1801) 3 M & G 486 190

(*q*) *Touart v Sellars* *supra* compare *Harris v Ingledew* (1731) 3 P Wms 91 93 *Freshfield v Reed* (1812) 9 M & W 404 As to presumptions generally see title EVIDENCE Vol XIII pp 440 497 *et seq*

(*r*) *Beavan v McDonnell* (1834) 10 Loh 154 compare *Lovatt v Tribe* (1862) 3 F & L 9 As to the limitation of the evidence admissible on an inquisition see p 406 *ante*

(*a*) *Ferguson v Borrett* (1859) 1 E & F 613 compare *East India Company and Frinseps v Dyce Smith* (1801) 4 W R 714 115 P C

(*b*) *Stock v Watts* (1848) 11 B & W 100 *Baileys v Goodfellow* (1870) L R 5 Q B 549 *Cartwright v Cartwright* (1793) 1 Phillim 90 100 *Scruby and Finch v Fordham* (1822) 1 Add 74 90 *In the Goods of Watts* (1837) 1 Curt 391 *Montefiore v Montefiore* (1824) 2 Add 354 361 362 *Chambers and Latman v Queens Fractor* (1840) 2 Curt 110 401 *Nicholls and Freeman v Birns* (1838) 1 Sw & Tr 239 *M Adam v Walker* (1813) 1 Dow 148 178 H L but see *Clark v Lear and Scarwell* (1891) cited 1 Phillim 119 *Evans v Knight and Moore* (1822) 1 Add 229 237 238 *Bannatyne v Bannatyne* (1852) 2 Rob Eccl 412 501 *Creagh v Blood* (1840) 8 I Lq R 434 *A G v Farther* (1792) 3 Bro C C 441 *Waring v Waring* (1848) 6 Moo P C C 341 *Jenkins v Morris* (1880) 14 Ch D 14 C A *Smee v Smee* (1879) 5 P D 84 *Murphy v Smith* (1887) 12 P D 116

(*c*) *White v Driver* (1809) 1 Phillim 84 88, *Cartwright v Cartwright* *supra* *Evans v Knight and Moore* *supra* *M Adam v Walker* *supra* *Anon* cited in *M Adam v Walker* *supra* at pp 178 179 *Coghlan v Coghlan* (undated) cited 1 Phillim 120 *Clarke v Lear* *supra* *Bannatyne v Bannatyne* *supra* In a criminal act these qualities or some of them are necessarily absent hence the difficulty of establishing a lucid interval against a lunatic accused of a crime (see *Hadfield's Case* (1800) 21 State Tr 1281)

(*d*) *French v Murray* (1813) 3 Curt 613 *Boughton v Knight* (1873), L R 3 P & D 64 *Arbery v Ashe* (1828) 1 Hag Eccl 214

to be suffering (e) As a rule the general habits and course of life of an alleged lunatic are of greater weight in considering the question of his sanity than are particular acts done by him, though very strange in themselves (f) as these may be the result of eccentricity or delirium and consistent with general sanity (g)

SECT 3  
Admissibility of  
Evidence

**838** Writings of the alleged lunatic are admissible in evidence on the issue, whether he be sane or not (h), and even his handwriting may be of some value as evidence for or against his sanity (i)

Writings of  
alleged  
lunatic

**839** The fact that insanity exists or has existed in the family of an alleged lunatic is certainly admissible in evidence against his sanity in a criminal case (l) and probably, also in civil proceedings (l)

Family  
weakness

**840** The treatment of an alleged lunatic by his friends or relations is admissible in evidence on the question of his sanity as between them and the alleged lunatic, but not as against third parties (m) Such treatment is also admissible to introduce evidence of what the alleged lunatic himself did with regard to it but not otherwise Thus letters written to an alleged lunatic are admissible if, and only if it is shown that they were read or acted upon by the alleged lunatic (n)

Treatment by  
friends

**841** The evidence of the alleged lunatic himself is insufficient either to establish his disability (o) or his sanity (p)

Evidence of  
alleged  
lunatic

**842** General reputation of insanity is not admissible in evidence either to prove the fact of insanity or to fix some person with notice of it (q)

General  
reputation

**843** The opinions of medical witnesses who have examined an alleged lunatic are admissible in evidence on the question whether the patient is or is not of unsound mind (r), but the opinion of a medical witness as to the existence of facts which he has not himself perceived is not admissible (s) In general the question of

Medical  
evidence

(e) See 1 Taylor Principles and Practice of Medical Jurisprudence 6th ed 548 *et seq*

(f) *Snook v Watts* (1848) 11 Beav 105

(g) See *Boughton v Knight* (1875) L R 3 P & D 64 *per* HANNEN J at p 75

(h) *Boote v Blundell* (1815) 19 Ves 494 506

(i) *Cartwright v Cartwright* (1793) 1 Phillim 90 100 and see 1 Taylor Principles and Practice of Medical Jurisprudence 6th ed 552 910

(k) *R v O'ford* (1840) 9 C & F 525

(l) *M Adam v Walker* (1813) 1 Dow 148 146 H I but see *Doe d Mather v Whitefoot* (1838) 8 C & P 212

(m) *Re Windham Windham v Windham* (1862) 31 L J (CH) 721 C A and see *Groom v Thomas* (1829) 2 Hag Ecc 433

(n) *Wright v Doe d Latham* (1834) 1 Ad & El 3 Ex Ch *Wright v Doe d Latham* (1834) 7 Ad & El 313 (1838) 4 Bing (NC) 469 H L and see title EVIDENCE Vol XIII pp 445 446 and p 448 note (1) and compare *Wheeler and Batsford v Alderson* (1831) 3 Hag Ecc 574 609

(o) *Knight v Young* (1813) 2 Ves & B 184

(p) *Boote v Blundell supra*

(q) *Giveslade v Dore* (1805) 20 Beav 284

(r) *R v Layton* (1849) 4 Cox CC 149 *R v Richards* (1858) 1 F & F 87 *Martin v Johnston* (1858) 1 F & F 122 *Loratt v Tribe* (1862) 3 F & F 9 As to the opinion of a medical witness who has not examined the alleged lunatic see *R v Frances* (1849) 4 Cox CC 574 *Doe d Barnbridge v Barnbridge* (1850) 4 Cox CC 454 *R v Searle* (1831) Mood & K 75 *McNaghten's Case* (1843) 10 Cl & Fin 200 H L

(s) Stephen Digest of the Law of Evidence art 49

**SECT 3**  
**Admissibility of Evidence**

Contradictory evidence

insanity and therefore, the question whether the opinions of the medical witnesses have been formed on sufficient grounds is for the jury to decide (t)

**844** Where the evidence is contradictory, the proper inference to be drawn is that which arises from the general effect and tendency of the whole body of proof on each side of the question (u). On an inquisition of lunacy the actual inspection of the person of the alleged lunatic is of great importance (b)

**SUB SECT 2—Findings of other Authorities having Jurisdiction**

Judicial inquisition

**845** The finding of a jury on an inquisition of lunacy is admissible as evidence of insanity or otherwise both in criminal (c) and in civil proceedings (d). Where such a finding is one of insanity it creates a presumption in favour of that fact and throws the onus of proof on those who contend the contrary (e). But the finding is not conclusive of the fact of insanity still less of the period when the insanity commenced (f), and the presumption may be rebutted (g). The fact that a person seeking to rebut the finding on an inquisition of lunacy attended the execution of the commission is itself conceived immaterial (h).

Master in lunacy

Similarly the order of a master in lunacy under the Lunacy Act 1890 (i) s 116, reciting that a person was in the opinion of the master of unsound mind is admissible as *prima facie* evidence of the fact of his insanity (k). But the report of a Chancery visitor in lunacy is not admissible (l).

Chancery visitor

Coroner's jury

It is doubtful whether the finding of a jury in a coroner's inquest is admissible as evidence of the fact of insanity in civil proceedings (m), but it is conceived it would be admissible (n).

(t) *Lovatt v Fove* (1812) 3 E & F 9 and see *Martin v Johnston* (1815) 1 F & F 122. The evidence of medical witnesses in lunacy cases is criticised by Lord COTTENHAM L C in *Re Dyce Scumbe* (1849) 1 Mac & G 116 128.

(a) See *Fatham v Wright* (1801) 2 Puz & M 1 per LINDAL C J at p 20 and compare *Lovatt v Sellars* (1817) 3 Dow 331 H L.

(b) Pope Law and Practice of Lunacy 2nd ed 415. As to admissibility of evidence see further title EVIDENCE Vol XIII pp 421 425.

(c) *R v Bowler* (1812) cited in Shelford on Lunatics etc 390.

(d) *Sergeon v Sealey* (142) 2 Atk 412. *Faulder v Suk* (1811) 3 Camp 126. *Dane v Kirkcull* (Viscountess) (1831) 9 O & P 619. *Hall v Warren* (1804) 9 Ves 607 609. *Browning v Reane* (1812) 2 Phillim 69. *Hume v Burton* (1785) 1 Fidd. Fall Rep 204. *Re Nesbitt an illeg d Lunatic* (1811) 2 Ph 210.

(e) *Hall v Warren supra*. *Snook v Watt* (1818) 11 Beav 106 and see *Van Grutten v Lowell*. *Mcruell v Van Grutten* [1897] A C 658 quoted in the judgment of COFFINS HARDY M R in *Hull v Clifford Clifford v Limms Clifford v Thellus* [1901] 2 Ch 236 244 O A.

(f) *Re Walden Ex parte Bradbury* (1839) 3 Jun 1108.

(g) *Sergeon v Sealey supra*. *Clement v Rhodes* (1821) 3 Add 37. *Hall v Warren supra*. *Rodd v Lewis* (1780) 2 Leo 176. *Portsmouth (Countess) v Portsmouth (Earl)* (1828) 1 Hag Lcc 365 366. *In the Goods of Watts* (1831) 1 Out 594. *Lannatyne v Lannatyne* (1802) 2 Rob Ecol 472 501. *Elliot v Ince* (1857) 3 W R 482. *Hume v Burton supra*.

(h) *Re Nesbitt, an illeg d Lunatic, supra*.

(i) 53 & 54 Vict c 0.

(k) *Harvey v R* [1901] A C 601 P C. As to the inspection of lunacy records see p 427, post.

(l) *Roe v New* [1893] F 55 see *Re B an Alleged Lunatic* [1892] 3 Ch 194 G A.

(m) *Jones v White* (1711) 1 Stra. 68.

(n) Pope Law and Practice of Lunacy 2nd ed 429.

## Part IV — The Jurisdiction of the Chancery Division of the High Court of Justice

### SECT 1 — *As to Person*

SECT 1

As to  
Person

**846** The Chancery Division has no jurisdiction to appoint a guardian of a lunatic's person (a) though where an infant ward of court becomes insane the jurisdiction to give directions as to his treatment is unaffected by the lunacy (b) As to person

### SECT 2 — *As to Property*

**847** The Chancery Division has a discretion to authorise the property of a lunatic either capital (c) or income (d) or both (c) to be applied for his maintenance so long as he lives under the care of a particular person who has charge of him (d), provided (1) no proceedings in lunacy have been taken or are in contemplation (e), (2) the property is under the control of, or is being administered by the Chancery Division (f) and (3) such property is small in amount (g). The jurisdiction arises not because but in spite of, unsoundness of mind (h) and is exercised under colour of administering a trust (i). On the same principle, where an infant trustee is a lunatic, the jurisdiction to convey the trust estate may be exercised because of the infancy and notwithstanding the lunacy (k) As to property

(a) *Re Blagh* (1879) 12 Ch D 364 O A. *Re Brandon's Trusts* (1879) 13 Ch D 713

(b) *Re Edwards* (1879) 10 Ch D 605 O A. As to the jurisdiction over wards of court see title INFANTS AND CHILDREN Vol XVII pp 146 *et seq*

(c) *Re Fuen's Will Trusts* (1886) 32 Ch D 39 O A

(d) *Re Blagh supra* *Re Silva's Trusts* (1888) 38 W R 366 *Re Brandon's Trusts supra* *Re T* (1880) 15 Ch D 76 *Re Carr's Trusts* *Carr v Carr* [1904] 1 Ch 792 O A. See however *Re Barler's Trusts* [1904] W N 15. As to payment or transfer to a foreign tutor or curator see p 453 *post*

(e) *Re Blagh supra* *Vane v Vane* *Vane v Vane* (1876) 2 Ch D 124

(f) *Re Grummett's Trusts* (1887) 56 L J (CH) 419 compare *Re Silva's Trusts supra*

(g) *Vane v Vane* *Vane v Vane supra*. When a small estate consists of a fund in court to a Chancery credit an order in lunacy appointing a quasi-committee is usually refused since the lunacy order would have to be followed by a Chancery order transferring the fund to the lunacy credit the desired relief can be obtained by means of an order in the Chancery Division alone if the application be made to that division direct

(h) *Beall v Smith* (1874) 9 Ch App 80 *per* JAMES LJ at p 92

(i) *Re Blagh supra*

(k) *Re Arrowsmith's Trusts* *Re Thompson (a Person of Unsound Mind)* (1858), 6 W R 642. See further title TRUSTS AND TRUSTEES

## Part V—The Jurisdiction in Lunacy

### SECT 1

#### The Judge in Lunacy

Judicial authorities

The judges in lunacy

### SECT 1—*The Judge in Lunacy*

**848** The jurisdiction in lunacy (referred to in the Lunacy Acts, 1890—1908 (*l*), as the jurisdiction of the judge in lunacy) is exercisable by the Lord Chancellor and by the Lords Justices of the Court of Appeal (*a*). To enable the concurrent exercise of Chancery jurisdiction where necessary the Lord Chancellor, acting under statutory powers in that behalf (*b*) requests each of the Lords Justices to act as an additional judge of the Chancery Division of the High Court of Justice for the purpose of making lunacy orders (*c*).

What petitions and applications are made to judge in lunacy or to master in lunacy

**849** Petitions for an inquisition for a traverse and for a *supersedeas* are in each case together with the evidence in support forwarded to the judge in lunacy direct by the lunacy officials (*d*) without being considered by the masters in lunacy (*e*). All other applications are made in the first instance by summons at chambers before a master in lunacy (*f*). If the application does not relate to administration and management the master prepares minutes of such order as he thinks should be made and brings the application the evidence and the minutes before the judge, who may himself make an order with or without the attendance of parties or may adjourn the matter into court or may refer the same to the master

(*l*) Lunacy Act 1890 (33 & 34 Vict c 5) Lunacy Act 1891 (34 & 35 Vict c 65) Lunacy Act 1908 (8 Edw 7 c 47) (frequently referred to in this title as the Lunacy Acts.)

(*a*) See Lunacy Act 1890 (53 & 54 Vict c 5) s 108 (1) and title COURTS Vol IX pp 94 95. In practice lunacy orders are made by one of the Lords Justices (in this title frequently called the judge in lunacy) sitting in chambers matters being referred to the Lords Justices in rotation by the lunacy officials. As to appeals from the Lord Chancellor or the Lords Justices sitting in lunacy to the Court of Appeal see title COURTS Vol IX pp 95 96 *Re Cathcart* [1893] 1 Ch 466 O A. As to the jurisdiction of the masters in lunacy see p 414 *post*.

(*b*) Judicature Act 1873 (36 & 37 Vict c 66) s 51.

(*c*) This request is not limited to petitions under the Trustee Acts but applies to all applications in lunacy which also require an exercise of Chancery jurisdiction (*Re Ilett (a Person of Unsound Mind)* (1887) 36 Ch D 410 (C A) such as the making of a vesting order of real estate in Ireland (*Re Lamotte* (1876) 25 W R 149 O A *Re Smyth* (1886) 34 W R 493) or directing the payment of costs incurred in opposing a bill in Parliament which affected a lunatic's real estate (*Re Blale a Lunatic* (1890) 72 L T 280 C A). But the Chancery jurisdiction can only be exercised in aid of the jurisdiction in lunacy (*Re Barber* (1888) 39 Ch D 187 O A) and does not enable a Lord Justice acting in lunacy matters except when sitting in court to order the transfer of funds from a Chancery to a lunacy account (*Re Armfield* (1889) 88 L T Jo 97 O A) see *Re Tate* (1882) 20 Ch D 135 C A (where such an order was made in court after the petition had been intitled in Chancery).

(*d*) As to these officials and the Lunacy Office see title COURTS Vol IX p 96.

(*e*) Rules in Lunacy 1892 rr 16—18 Stat R & O Rev Vol VIII Lunatic England, pp 1 *et seq*. As to the nature of these proceedings see p 415 *post*.

(*f*) Rules in Lunacy 1892 r 19.

for further inquiry (*g*) The above practice applies in the case of summonses for vesting orders under the Lunacy Act, 1890 (*h*) ss 135 136 and for the appointment of new trustees under the Lunacy Act, 1890 (*i*) s 141 also in cases in which as regards a lunatic so found the judge has under the Lands Clauses Acts (*j*) the Settled Estates Act 1877 (*k*), the Settled Land Acts 1882—1890 (*l*), or any other enactment, jurisdiction to make an order affecting his property (*m*)

SECT 1  
The Judge  
in Lunacy

**850** The judge in lunacy has an appellate jurisdiction in the case of any person who is affected by any order decision or certificate of a master. The appellant can appeal to the judge without a fresh summons on giving notice of appeal signed by his solicitors within eight days to the person (if any) interested in supporting the order decision or certificate appealed from and lodging a copy of his notice at the Lunacy Office (*n*). Should the judge deem the matter of sufficient importance he will adjourn the same into court for argument before the Lords Justices as judges in lunacy

Appeal from  
order of  
master

**851** In exercising all powers (which powers extend to property within any British possession (*o*)) under the Lunacy Acts (*p*) or under any other Act the paramount consideration for the judge in lunacy is the interest of the lunatic (*q*). The powers are exercisable for the benefit of him and his family and where it appears expedient, in duly managing his property (*r*)

Paramount  
principle in  
exercising  
jurisdiction

(*g*) Rules in Lunacy 1892 rr 22 23

(*h*) 53 & 54 Vict c 5

(*i*) *Ibid* In these cases it seems the order cannot be made by a master see *Re Langdale (a Lunatic)* [1901] 1 Ch 3 C A

(*j*) For which see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 56 *et seq*

(*k*) 40 & 41 Vict c 18

(*l*) See p 444 *post* and title SETTLEMENTS

(*m*) Rules in Lunacy 1892 r 20 In the case of a lunatic not so found by inquisition it seems the order can be made by a master provided the aid of the Chancery Division is not required (Lunacy Act 1908 (8 Edw 7 c 47) s 1)

(*n*) Rules in Lunacy 1892 r 11 and Forms 2 and 3 in schedule thereto The notice of appeal together with the evidence thereon is forwarded by the lunacy officials to one of the Lords Justices who will hear the matter in his private room No fee is payable on the setting down of an appeal

(*o*) Lunacy Act 1890 (53 & 54 Vict c 5) s 110 For the definition of British possession, see title DEPENDENCIES AND COLONIES Vol X p 503

(*p*) As to these Acts see note (*l*) p 412 *ante*

(*q*) *A G v Alesbury (Marquis)* (1887) 12 App Cas 672 *per* Lord MACNAGHTEN at p 688 *Awdeley v Awdeley* (1890) 2 Vern 192 *Ex parte Annandale (Marchioness)* (1749) Amb 80 *Ex parte Grimstone* (1772) 4 Bro CC 235 n *Oxenden v Compton (Lord)* (1793) 2 Ves 69 72 73 *Re Badcock a Lunatic* (1840) 4 My & Cr 440 *Re Gist (a Person of Unsound Mind)* [1904] 1 Ch 398 C A *per* STIRLING LJ at p 411 and *Re Tye (a Person of Unsound Mind not so Found)* [1900] 1 Ch 249 C A

(*r*) Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (4)



## SECT 2

The  
Masters in  
LunacyPowers and  
duties.SECT 2—*The Masters in Lunacy*

**852** The masters in lunacy (s) have the same powers and duties as the masters in lunacy had before the Act of 1890 (t), and, further, may exercise the jurisdiction of the judge in lunacy as regards administration and management (u). Many of the powers included in the latter words are set forth in the Lunacy Act, 1890 (v) ss 116—130 but the words are not limited to the matters dealt with in those sections (w). Thus a master may under the Lunacy Act 1890 (v) s 108 appoint a receiver of the dividends of a person within s 116 (1) (b) of that Act (x) and he may under ss 128 129 of that Act appoint the *quasi* committee of a person within s 116 (1) (c) of that Act to exercise such person's power of appointing new trustees, and in such case may in effect make order vesting the trust stock or the trust land (y), and he may under the Lunacy Act 1890 (v) s 133 make an order vesting stock standing in the name of a lunatic beneficially entitled thereto (a). But a master cannot under s 136 of that Act (v) make an order vesting stock held by a lunatic as trustee (b). The last mentioned powers include those cases in which under special Acts (c), the judge can make orders affecting the property of a lunatic so found (d).

In addition a master may hold an inquiry (e) and must perform all other duties for the benefit of lunatics and their estates which the Lord Chancellor may direct (f). In the case of lunatics so found the master deals with many questions relating to the lunatic's person (g). But in the case of lunatics not so found his jurisdiction extends only to the estate (h).

Masters have power to administer oaths and to summon witnesses before them (i) and also to order the attendance of the

Powers as to  
procedure

(s) As to these officers and their qualifications see titles BARRISTERS Vol II p 351 COURTS Vol IX p 96

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 111 (1)

(u) Lunacy Act 1891 (54 & 55 Vict c 6) s 27 (1) Rules in Lunacy 1892 r 10 Lunacy Act 1908 (8 Edw 7 c 47) s 1 As to these powers see generally pp 428 *et seq post* As to forgery of the signature or seal of the masters see title CRIMINAL LAW AND PROCEDURE Vol IX p 79

(v) 53 & 54 Vict c 5

(w) *Re Langdale (a Lunatic)* [1901] 1 Ch 3 O A *Re Browne* [1894] 3 Ch 412 414 C A

(x) *Re Browne supra* see p 452 *post*

(y) *Re Shonbridge (a Person of Unsound Mind)* [1895] 1 Ch 278 O A *Re Fuller (A Person of Unsound Mind not so Found)* [1900] 2 Ch 551 O A see p 450 *post*

(a) *Re Browne supra* see p 452 *post*

(b) *Re Langdale (a Lunatic) supra* see p 452 and note (i) p 456 *post*

(c) As to such Acts see p 413 *ante*

(d) See *Re S S B (a Person of Unsound Mind not so Found by Inquisition)* [1906] 1 Ch 712 725 C A

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 112

(f) *Ibid* s 111 (1)

(g) Pope, Law and Practice of Lunacy 2nd ed 109, Elmer, Practice in Lunacy 7th ed, 180 *et seq*

(h) Lunacy Act, 1890 (53 & 54 Vict c 5) s 116 (2)

(i) *Ibid*, s 114

alleged lunatic at any time or place specified by them and the orders can be enforced in the same way as orders of a judge of the High Court (*h*)

SECT 2  
The  
Masters in  
Lunacy

### SECT 3 — *The County Court*

**853** A county court judge has power to deal with property of small value belonging to a lunatic in respect of whom a reception order has been made (*l*) but cannot make a vesting order of stock standing in the name of a lunatic (*m*)

Power of  
judge.

## Part VI — Judicial Inquisition as to Lunacy

### SECT 1 — *When required*

**854** Proceedings in lunacy can be originated in one of two ways, either by petition for an inquiry (*n*) or by summons for the appointment of a person to exercise the powers of a committee of the estate (*o*), hereinafter referred to as a *quasi* committee (*p*) In the former case the patient being found by inquisition to be of unsound mind (*q*) the custody of both his estate and person are under the jurisdiction of the judge in lunacy (*r*) In the latter case the lunacy jurisdiction only extends to the patient's estate (*s*) But inasmuch as any powers which could be exercised by a committee of the estate may by order be exercised

Origination

(*h*) Lunacy Act 1891 (54 & 55 Vict c 65) s 26 (2) *Re B (an Alleged Lunatic)* [1892] 1 Ch 459, C A. Lunacy Act 1908 (8 Edw 7 c 47) s 3 As to the power of a master to make an order for attachment see title CONTINUANCE OF COURT ATTACHMENT AND COMMITMENT Vol VII p 315

(*l*) See title COUNTY COURTS Vol VIII p 669 As to reception orders see p 490 *post*

(*m*) *Re Noyce* [1892] 1 Q B 642 C A.

(*n*) Rules in Lunacy 1892 r 16 As to the presentation of petition see p 412 *ante* and p 416 *post* The terms commission of lunacy or the inquisition thereon when used in any Act of Parliament order or rule includes the general commission and the inquisition (or certificate) and the issue and verdict (see Lunacy Act 1890 (53 & 54 Vict c 5) s 334)

(*o*) Rules in Lunacy 1890 r 19 see p 428 *post*

(*p*) The person so appointed is described in the marginal note to the Lunacy Act, 1908 (8 Edw 7 c 47) s 1, as a *quasi* committee and the same expression is for the most part applied to him in the judgments of the Court of Appeal in *Re S S B (a Person of Unsound Mind not so Found by Inquisition)*, [1906] 1 Ch 712 C A. It is believed that in practice he is sometimes described as a 'receiver' but having regard to the marginal note and the judgments above referred to and in view also of the different powers and duties of a receiver appointed in a Chancery action (for which see title RECEIVERS) it seems preferable to use the expression '*quasi* committee, which is accordingly retained throughout this title

(*q*) Lunacy Act 1890 (53 & 54 Vict c 5), ss 94, 95.

(*r*) *Ibid* s 108 (2)

(*s*) *Ibid* s 116 (2) see p 430 *post*

SECT 1  
When  
required

by a duly constituted *quasi* committee (t) there is, so far as the custody and management of the patient's estate is concerned, little or no object in ordinary cases in presenting a petition for an inquiry, especially as such procedure is more costly and more lengthy than an application by summons for the appointment of a *quasi* committee

Need for  
application  
by petition

An application by petition will however be necessary to obtain the control of the lunatic's person (u) and may also be required when an alleged lunatic files a notice of objection to an application by summons for the appointment of a *quasi* committee (v)

When ordered  
on report of  
Com  
missioners in  
Lunacy

An inquisition may also be ordered (u) on a report of the Commissioners in Lunacy (x) that the property of any person detained or taken charge of as a lunatic but not so found by inquisition is not duly protected or that the income thereof is not duly applied for his benefit (y) Such report is deemed to be an application for an inquisition supported by evidence (z)

Jurisdiction  
over aliens

**855** There is jurisdiction to order an inquisition (u) in the case of an alien domiciled abroad but temporarily resident in this country and with property here (b) even though the property in England consists only of a few personal chattels and some cash (c) But apparently there is no jurisdiction to order an inquisition in the case of an alien both domiciled and resident abroad although entitled to property in England (d)

## SECT 2—The Inquisition

### SUB SECT 1—Proceedings before Inquiry

Who should  
be petitioner

**856** The petitioner should be the alleged lunatic's nearest relation (r) and if the patient is married and the application is not made by the husband or wife, such husband or wife should be

(t) Lunacy Act 1908 (8 Edw 7 c 14) s 1

(u) There is no provision in the Lunacy Act 1890 (53 & 54 Vict c 5) or in its amending Acts which enables the court to authorise the exercise by a *quasi* committee of any powers over the person of his patient

(v) Rules in Lunacy 1892 r 50 Rules in Lunacy 1893 r 1 and see p 430 *post*

(w) For the authority by whom an inquisition may be ordered see p 412 *ante*

(x) As to the Commissioners in Lunacy see p 466 *post*

(y) Lunacy Act 1890 (53 & 54 Vict c 5) s 100

(z) *Ibid* The report is usually referred to the official solicitor (see title Courts Vol IX p 71) to take such steps as he may consider expedient thereunder

(a) For the authority by whom an inquisition may be ordered see p 412 *ante*

(b) *Re Bariatinski (Princess)* (1843) 1 Ph 375 *Re Sottomaior (a Lunatic)* (1874) 9 Ch App 677 *Re Burbidge* [1902] 1 Ch 426 C A

(c) *Re Burbidge supra*

(d) It is true that the *ratio decidendi* in *Re Bariatinski (Princess)* *supra* was the necessity of taking charge of the lunatic's property for her without regard to her residence at the time. None the less the Lords Justices have on several occasions expressed some doubt as to whether they had jurisdiction in such a case (see *Re Soltykoff (Princess)* [1898] W N 77 C A)

(e) *Ex parte Perce* (1828) 1 Mcl 220

served (*f*) On the other hand, lunatics may require protection against their relatives quite as much as against other persons (*g*) and an inquiry may therefore be granted on the application of even a stranger in blood without regard to his motive (*h*) The stranger may even be given the conduct of the inquiry (*h*) On a contest for the conduct that party is selected who is most likely to bring out the whole truth subject to which a preference is given to the nearest of kin (*i*), and other things being equal to the petitioner who is first in point of time (*j*) A wife is not entitled as of right to the conduct as against children whose petition was the earlier in date (*j*) No person can himself present a petition for inquiry into his own state of mind On the death of a petitioner after the petition is answered but before the inquiry is held a new petition for a supplemental order must be presented but no further evidence need be filed (*k*)

SMCT 2  
The  
Inquisition  
Conduct of  
proceedings

Death of  
petitioner

**857** The petition must be signed by the petitioner attested by a solicitor (*l*) and filed in the master's office (*m*), together with two medical affidavits proving the insanity of the patient and an affidavit of his kindred and property

Signature and  
filing

**858** No order can be made upon any petition or report until seven days after service of notice of the petition or report upon the alleged lunatic (*n*) either personally or where personal service cannot be effected or is inexpedient by being delivered to some adult inmate at the usual or last known place of abode of the alleged lunatic (*o*) Where the alleged lunatic is not within the jurisdiction it will not be necessary to give him notice of the application for inquisition (*p*)

Service

**859** In all cases the court has to consider what in all the circumstances of the case is most for the benefit of the patient and for his protection (*q*)

General  
principle

(*f*) *Re Rean* (1809) 2 Coop temp Cott 163 When the petition is not presented by the nearest relation it is usual and desirable to explain the circumstances either in the petition or in the evidence in support

(*g*) *Re E. S. (a Supposed Lunatic)* (1876) 4 Ch D 501 O A per JAMES I J at p 304

(*h*) *Ex parte Ogle* (1808) 15 Ves 112

(*i*) *Re Nesbitt an Alleged Lunatic* (1847) 7 Ph 245 *Re Webb* (1846) 2 Ph 10 *Re Green* (1831) 2 Coop temp Cott 165

(*j*) *Re Wood* (1860) 29 L J (Ch) 54 O A

(*k*) *Re Martin* (1897) Registrars Library Lunacy Office

(*l*) Rules in Lunacy 1892 r 16 For form of petition and other forms in connection with lunacy proceedings see Heywood and Massey's Lunacy Practice 4th ed

(*m*) Rules in Lunacy 1892 r 18 The petition should be lodged in duplicate The original is then sealed with the lunacy seal and handed back to the petitioner's solicitor to enable him to effect service

(*n*) Rules in Lunacy 1892 r 28

(*o*) *Ibid* r 29 An affidavit of service must be filed with the masters (*ibid*)

(*p*) Lunacy Act 1890 (53 & 54 Vict c 5) s 96 In practice however it is usually found more expedient to give notice by registered letter and this course is approved by the judge

(*q*) *Re McLaughlin* [1905] A C 343 P O per Lord DAVEY at p 347 If service on the alleged lunatic is medically undesirable the doctor's affidavits, filed in support of the petition should state this

## SECT 2

**The  
Inquisition**

Where  
medical access  
difficult

**860** Should the petitioner experience difficulty in obtaining medical access to the alleged lunatic before presentation of the petition, he must file the best evidence obtainable in support of his case, and ask in the prayer of the petition that a visitor in lunacy may be sent to see the patient and report to the court (r). Should the petitioner require medical access after the order for an inquiry is made, in order to prove his case, a summons must be issued (s).

Interlocutory  
orders

Protection of  
property and  
person

**861** Any interlocutory order necessary or desirable for the protection of the alleged lunatic or his estate pending the inquisition may be made. An interim receiver may be appointed (t). An allowance may be authorised for household expenses and for the expenses of opposing the inquiry (a). The wife of the alleged lunatic and all other persons in whose custody or power his personal estate and effects are may be restrained from converting them to their own use or parting with them (b) and protection of the person of the alleged lunatic may be granted (c).

Access

Access may be granted to the alleged lunatic for the purpose of enabling him and his friends to oppose the inquiry and the persons having his custody may be restrained from interfering or interrupting the friends, their solicitors or medical advisers in such visits and from removing or concealing him from his friends or their solicitors or medical advisers (d). The patient's removal abroad pending the inquiry may also be restrained (e). When the alleged lunatic is confined in prison his production at the inquiry may be obtained on *habeas corpus* as also when he has been committed for trial by magistrates (f). If from the residence of the alleged lunatic out of the jurisdiction it is important to procure the evidence of witnesses abroad a commission to take such evidence may on proof of its necessity be obtained on an application to the court for the purpose. An application of this kind would seem to form part of the original application for an inquiry (g).

Evidence by  
commission

(r) *Re — an Alleged Lunatic* (1881) 18 Ch D 26 O A. At this stage of the proceedings it is only necessary to establish a *prima facie* case of insanity sufficient to justify an investigation and on the footing that such investigation may be for the benefit of the alleged lunatic the judge will assist the petitioner.

(s) Rules in Lunacy 1892 r 19. Compare *Re Fletcher* (1832) Shelford on Lunatics etc 2nd ed 175 126 and see *Re A Y* (1881) 45 L T 97 O A. If the medical witnesses for the alleged lunatic have seen him alone they are not entitled to be present when the medical witnesses for the petitioner see him (*Re — an Alleged Lunatic supra*).

(t) *Re Helsh a Lunatic* (1745) 3 Atk 635. *Re Pountain* (1958) 37 Ch D 609 O A. For a case where a receiver and manager was appointed the term 'interim receiver' being considered inappropriate see *Re A G* (1909) 53 Sol Jo 615.

(a) *Re Bullock* (1886) 35 W R 109 C A. *Re Naylor* (1862) 1 New Rep 73 O A. *Re Baker* (1815) Shelford on Lunatics etc 2nd ed 159 160.

(b) *Re King* (1827) Shelford on Lunatics etc 2nd ed 159.

(c) *Re Naylor* (1862) 1 New Rep 173 O A.

(d) *Re Fletcher* (1832) Shelford on Lunatics etc 2nd ed 125 126.

(e) *Re Frank* (1825) Shelford on Lunatics etc 2nd ed 129.

(f) *R v Peacock* (1870) 12 Cox O O 21 see title CROWN PRACTICE Vol X p 54.

(g) See title EVIDENCE Vol XIII pp 609 *et seq*, Elmer Practice in Lunacy 7th ed 28. *Re Soltykoff (Princess)*, [1898] W N 77 C A.

SUB SECT 2 —*The Inquiry*SECT 2  
The  
Inquisition  
Form of order

**862** The order directing the inquisition (*h*) should state the place where the same is to be held, usually at the alleged lunatic's residence, or as near thereto as circumstances will permit. If he is out of the country it is usually at the place where his mansion house and estate lie (*i*) or if he has neither property nor residence in England, then in the county of Middlesex (*k*). Where there is a strong local feeling the inquiry may be held in London (*l*), and the venue may also be changed to save expense or for the convenience of witnesses (*m*).

**863** The person executing an inquisition while so employed, has all the powers authorities and discretion of a judge of the High Court (*n*).

Powers of  
person  
executing  
commission

**864** No one but the petitioner and the alleged lunatic and their respective advisers can take part in an inquiry without the special permission of the court (*o*) to be obtained on application to the master by summons (*p*). Whether leave will be granted is a matter of practice in the master's discretion (*q*). Mere relations (*r*) or persons benefiting under the alleged lunatic's will (*s*), are not for those reasons entitled to attend. But a *cestui que trust* under a settlement executed by the alleged lunatic (*t*) and a wife interested under a will (*u*) may be allowed to attend on

Parties who  
may attend

(*h*) This order is drawn up by the lunacy officials stamped by the petitioner's solicitor with a £2 stamp and retained by the lunacy officials. No office copy thereof is issued. A precept is then issued by the lunacy stationers stating the time and place of inquiry and addressed (if no jury) to the petitioner's solicitor and (if a jury) to the sheriff. At the same time subpoenas should be obtained from the lunacy stationers for service on the witnesses.

(*i*) *Ex parte Southcott* (1851) 2 Ves Sen 401 and see note (*m*) *infra*.

(*k*) *Re Webb a Supposed Lunatic* (1846) 2 Coop temp Cott 145. *Re Scott, an Alleged Lunatic* (1874) 22 W R 748 O A.

(*l*) *Re — an Alleged Lunatic* (1881) 18 Ch D 26 O A.

(*m*) In *Ex parte Baker* (1815) 19 Ves 340 Lord ELDON L C stated that inquisitions were uniformly executed at the residence of the party which for that purpose was his mansion house and if there was no mansion house then at his last place of abode. The Lord Chancellor intimated that there was no instance of any exception and that the convenience of witnesses or of counsel was immaterial. In *Re Mills* (1830) 2 My & Cr 39 n (*a*) the alleged lunatic was staying at Stamford and the inquisition was held in Middlesex where the principal witness resided. Similar changes of venue to save expense and for the convenience of witnesses also took place in *Re Green* (1831) Sheffield on Lunatics etc 2nd ed 123 and in *Re Waters* (1836) 2 My & Cr 38 and it is now settled practice that on a proper case being made out the trial may take place elsewhere than at the lunatic's residence. In every case in which an alteration of venue is desired such alteration should be asked for in the petition and should be dealt with by the evidence filed in support.

(*n*) Lunacy Act 1890 (53 & 54 Vict c 50) s 99, Lunacy Act 1891 (54 & 55 Vict c 65) s 26. As to the power to commit for disobedience to orders or for contempt of court see p 415 *ante* and note (*r*) p 421 *post*.

(*o*) *Re Clements* (1831) 2 Coop temp Cott 166.

(*p*) Rules in Lunacy 1892 r 19.

*Re Lanwarne* (1882) 46 L T 688, O A.

*Re Nesbitt an Alleged Lunatic* (1847) 2 Ph 245.

*Re Scarlett* (1873) 8 Oh App 739.

*Re Richards an Alleged Lunatic* (1852) 1 De G M & G 719 O A.

(*u*) *Re Parkinson* (1841) 5 Jur 547. Since the only question to be determined

## SECT 2

The  
InquisitionInquisition  
before jury

terms as to costs. The material point is that the truth should be ascertained (a)

**865** An alleged lunatic may, either by notice filed before the consideration of the petition or report (b), or upon such consideration demand an inquisition before a jury (c). If he does the judge must direct the return of a jury unless he is satisfied by personal examination of the alleged lunatic that he is not mentally competent to form and express a wish for an inquisition before a jury (d). The inquisition must also take place before a jury where the alleged lunatic is not within the jurisdiction (e) and also where the master upon consideration of the evidence certifies that in his opinion an inquisition before a jury is expedient (f).

Number of  
jurors.

The number of jurors on an inquisition must not exceed twenty-four nor be less than twelve. They need not be unanimous, but twelve at least must be agreed on their verdict (g).

Trial of issue  
in High  
Court.

**866** When the judge has directed an inquisition before a jury he may order an issue to be tried in the High Court whether the alleged lunatic is of unsound mind and incapable of managing himself and his affairs or whether he is a person of unsound mind and incapable of managing his affairs but capable of managing himself and is not dangerous to himself or others (h). The trial of such issue will be regulated in the first place by the provisions of the Lunacy Act 1890 (i) as to inquisitions the trial of inquisitions and the constitution of the jury and subject thereto by the Rules of the Supreme Court and a verdict will have the same effect as a verdict on an inquisition (i).

on the inquiry is whether the alleged lunatic is of unsound mind at the date of the inquiry (Lunacy Act 1890 (53 & 54 Vict c 5) s 98) it is now impossible to attempt to carry back the insanity to the time when a particular document was executed or transaction took place or to attempt to prove that at some antecedent date insanity had not supervened. It follows that the question of attending the proceedings on the ground that an interest is at stake dependent on the date to which insanity is carried back by the verdict of the jury can never arise at the present day and liberty to attend is therefore more frequently refused than formerly.

*Re Nesbitt an Alleged Lunatic* (1847) 2 Ph 24.

(b) The petition or report is forwarded to the judge for consideration seven days after service thereof and of the notice endorsed thereon on the alleged lunatic compare Rules in Lunacy 1892 r 28.

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 90 (2). Rules in Lunacy 1897 30. The right of the alleged lunatic to demand a jury is confined to the original inquiry (*Re Fulbot (an Alleged Lunatic)* (1887) 20 Ch D 269 C A) and the withdrawal of such demand must be by the alleged lunatic his counsel or solicitor orally (Lunacy Act 1890 (53 & 54 Vict c 5) s 90 (3) *Re Crompe* (1869) 4 Ch App 603). A notice demanding a jury must be signed by the alleged lunatic and attested by a solicitor (Rules in Lunacy 1892 r 30). As to juries in general see title JURIES Vol XVIII pp 220 et seq.

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 91.

(e) *Ibid* s 96.

(f) *Ibid* s 93.

(g) Compare Lunacy Act 1890 (53 & 54 Vict c 5) s 97 and see *Re Windham Windham v Grubler* (1862) 6 L J 479 C A. The practice is always to summon twenty-three special jurors and compare title JURIES Vol XVIII p 244.

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 94. No writ need be issued when an issue is directed to be tried (*Re Scott* (1884) 27 Ch D 116 C A).

(i) Lunacy Act 1890 (53 & 54 Vict c 5) s 94.

**867** Where the alleged lunatic does not demand a jury, or the judge in lunacy (*j*) is satisfied by a personal examination that he is not mentally competent to form and express a wish in that behalf and it appears to a judge upon consideration of the evidence and of the circumstances of the case to be unnecessary or inexpedient that the inquisition should be before a jury then the master executes the inquiry without a jury (*k*) and the master's certificate of sanity or insanity will have the same effect as the finding of a jury (*l*)

SECT 2  
The  
Inquisition  
—  
When inquiry  
executed  
without a  
jury

**868** The inquisition will be confined to the question whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself or his affairs. No evidence as to anything done or said by the alleged lunatic or as to his demeanour or state of mind at any time more than two years before the time of the inquisition is receivable in proof of insanity or on the trial of any traverse of an inquisition unless the person executing the inquisition otherwise directs (*m*)

Limit of  
inquisition

**869** Either on the trial of an issue or on an inquisition the alleged lunatic must if within the jurisdiction be examined both before any evidence is taken and again before the jury consult as to their verdict (*n*) or if the inquisition is without a jury before the master signs his certificate of sanity or insanity (*o*). The judge or master may however dispense with this double examination (*p*) but one examination there must be (*q*) either in open court or in private as the judge or master may direct (*p*). Orders may be made on an alleged lunatic to attend and submit to examination at the time and place specified in the order (*r*). Where the alleged

Examination  
of alleged  
lunatic

(*j*) See p 412 *ante*

(*k*) Lunacy Act 1890 (53 & 54 Vict c 5) s 92

(*l*) *Ibid* s 90

(*m*) *Re Sottomajor (a Lunatic)* (1874) 9 Ch App 617. Lunacy Act 1890 (53 & 54 Vict c 5) s 98 (1) and compare *Re Danby an Alleged Lunatic* (1880) 30 Ch D 320 C A. Formerly the jury on an inquisition might be asked to state at what date the patient's insanity commenced and the inquiry might move over the greater part of his life. As an instance of such an inquiry see *Re Windham* (1862) 10 W B 499.

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 94 (2). Lunacy Act 1891 (54 & 55 Vict c 60) s 26.

(*o*) Lunacy Act 1890 (53 & 54 Vict c 5) s 92

(*p*) *Ibid* s 94 (2). The object of the first examination is to avoid the expense of a lengthy trial as such preliminary examination might perhaps by itself in certain cases convince the jury of the patient's insanity. The object of the second examination is that the jury may see the patient after hearing the evidence. Regard will be had to the alleged lunatic's health and convenience in deciding whether the examination shall take place in private or in open court. In order to cause the alleged lunatic as little inconvenience as possible some times one or two of the jury see him and report to the rest (*Ex parte Smith* (1818) 1 Swan 47) but in strictness the supposed lunatic is entitled to the judgment of all the jurors. However orders for the examination of the supposed lunatic by some only of the jury have been made and Lord ELDON said this was not uncommon in his time (*Re B (an Alleged Lunatic)*, [1891] 3 Ch 274 C A *per* LINDLEY L J at p 270).

(*q*) *Re J B a Supposed Lunatic* (1836) 1 My & Cr 538.

(*r*) Lunacy Act 1891 (54 & 55 Vict c 60) s 26. In case of disobedience to his order the master himself has jurisdiction to order an attachment see p 416 *ante*. As a matter of convenience and discretion however it



**SECT 2** lunatic is not within the jurisdiction his presence on the trial of  
**The** the inquisition may be dispensed with, the order directing the  
**Inquisition** the inquisition having been previously served on him by registered  
 post (s)

### SUB SECT 3—*Special Finding*

**Special  
 finding**

**870** If it appears that an alleged lunatic is of unsound mind so as to be incapable of managing his affairs but that he is capable of managing himself and is not dangerous to himself or others it may be so specially found and certified (t) Such a finding constitutes the patient a lunatic so found by inquisition for all purposes connected with the management or administration of his estate (u)

### SUB SECT 4—*Quashing*

**For uncer-  
 tainty or  
 irregularity**

**871** The finding on an inquisition is *prima facie* evidence of insanity, and may be read in proof of it but it is not conclusive as to the fact and may be quashed for uncertainty or irregularity (a) Thus any verdict departing substantially from the issue (b) or which is not an absolute finding but an inference may be quashed and a new inquiry made (c) The court may also quash the inquisition and direct a new one where there has been any misbehaviour on the part of the jury (d) or if the inquisition be not executed at the place named in the order (e) or if an order that the lunatic should have due notice has been disobeyed (f) But an error in the name of the lunatic may be corrected by an order (g)

**Procedure**

The application to quash should be made by motion to the Lords Justices in court (h)

is desirable that the master should refer such applications to the Lords Justices in order that a matter involving the liberty of the subject may be dealt with judicially in open court (*Re B (an Alleged Lunatic)* [1891] 3 Ch 274) (*C A per LINDLEY LJ* at p 216)

(s) *Re Lanwarne* (1882) 46 L T 668 Lunacy Act 1890 (53 & 54 Vict c 5) s 96

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 98 (2) As to the powers of the judge in such a case see p 420 *ante*

(u) *Re Townshend s (Lord) Settlemen Townshend (Lord) v Robins* [1906] 1 Ch 201

(a) *Elmer Practice in Lunacy* 7th ed 30

(b) See p 421 *ante*

(c) *Ex parte Cranmer* (1906) 12 Ves 445 *Ex parte Read* (1654) cited in 3 Atk 169 The following returns have all been held to be bad namely that the party is not a lunatic but that partly from paralysis and partly from old age his memory is so much impaired as to render him incompetent to the management of his affairs and consequently of unsound mind and that he has been so for the term of two years last past (*Re Holmes* (1827) 4 Pass 15), incapable of governing himself or his lands (*Ex parte Barnley* (1744) 3 Atk 168, that by his appearance he was not always in his senses as other men be (*Ex parte Freak* (1733) cited 3 Atk 168) that she is not of sufficient understanding to manage her own affairs (*Ex parte Harvey* (1734) cited 3 Atk 163) and found not a lunatic but incapable (*Ex parte Ashton* (1733) cited 3 Atk 163)

(d) *Ex parte Roberts* (1740) 3 Atk 5

(e) See p 419 *ante*

(f) *Ex parte Hall* (1802) 1 Ves 261

(g) *Re Crawford a Lunatic* (1836) 1 M & Cr 240

(h) Compare R S C Ord 30 r 1A and see p 412 *ante*.

**SECT 3—Proceedings subsequent to a Finding of Lunacy on Inquisition**

**SUB SECT 1—Inquiries as to Lunatic's Position**

**872** Immediately after the finding of lunacy the party having conduct of the proceedings must take out a summons to inquire into (1) the lunatic's age position in life and residence, (2) the nature of his lunacy (3) who are his next of kin and heir at law (4) who ought to be appointed committee of his person and of his estate, (5) of what his property consists and particulars thereof (6) the amount of his income and (7) as to his past and future maintenance (i) The inquiry is held before the master who may make such order on the summons as he thinks expedient (j) In particular he may defer the inquiries respecting the lunatic's next of kin and heir at law (k) and may also inquire as to the lunatic's debts the dealings with his estate prior to inquisition and as to the nature of the property out of the jurisdiction (l)

**873** The master usually also determines who shall attend future proceedings Strangers in blood may sometimes be allowed to attend (m) but the mere fact that a stranger is interested under the will of the lunatic is not sufficient reason (n) If the lunatic is illegitimate the Attorney General attends (o) but not the Attorney General for the Duchy of Lancaster (p)

**SUB SECT 2—Appointment of Committee**

**874** In appointing a committee the court will be guided by the following considerations the husband or wife (if any) will have the first claim to the position although not a paramount one (g) where applicable the principle will be applied of appointing the heir at law as committee of the estate (a) and the next of kin as committee of the person (b) relations will be preferred to strangers (c) the proposed committee should reside within the jurisdiction (d) although this is not always insisted upon (e) accounting parties and solicitors in the matter will not as a rule be appointed (f)

Where separate appointments of committees of the person and of the estate are made it is usual to appoint a person of the same

**SECT 3**  
**Proceedings**  
**subsequent**  
**to a Finding**  
**of Lunacy**  
**on Inqui**  
**sition**  
Summons for  
inquiries

Parties who  
may attend

Principles  
followed in  
appointing  
committee

Separate  
committees

(i) Rules in Lunacy 1892 r 31

(j) *Ibid* r 32

(k) *Ibid* rr 32 36—38

(l) *Ibid* rr 33—35

(m) *Re Webb* (1846) 2 Ph 10 116

(n) *Re Scarlett* (1873) 8 Ch App 739

(o) *Re Early* (1837) 2 Coop temp Cott 107 108 *Ex parte Watson* (1821) Jac 161

(p) *Re Kershaw* (1882) 21 Ch D 613 O A

*Re Davy (a Lunatic)* [1892] 3 Ch 38 O A

*Re Bangor (Lord) a Lunatic* (1818) 2 Mol 518

*Ex parte Cockayne* (1802) 7 Ves 591

(c) *Re Le Heup* (1811) 18 Ves 221

(d) *Re Shields a Lunatic Ex parte Ord* (1821) Jac 94

(e) *Re Bruce (a Lunatic of Unsound Mind)* (1881) 17 Ch D 775 O A *Re Hopper* (1897) 66 L J (OH) 569 O A

(f) Compare *Ex parte Pencks* (1817), 2 Mer 452, and *Re Mullington* (1854), 2 Eq Rep 168 O A and see p 432 *post*

**SECT 3**  
**Proceedings**  
**subsequent**  
**to a Finding**  
**of Lunacy**  
**on Inqui**  
**sition**

When  
 appointment  
 takes effect

Circum  
 stances giving  
 rise to new  
 appointment

sex as the lunatic to be committee of the person (*g*) and regard will be had to any expressions or wishes of the lunatic on the subject (*h*) A grant of the custody of the lunatic to two persons jointly is unusual and inconvenient (*i*)

**875** Every appointment of a committee of the person takes effect immediately on the making thereof (*k*) and of a committee of the estate on completion of security (*l*) Where several committees are appointed the order may direct the custody of the estate or person to continue to the survivor or survivors (*m*)

**876** If a committee makes default in perfecting his security or if a receiving order in bankruptcy is made against him or he compounds with his creditors or absconds or goes to reside permanently abroad or on the death or discharge of a committee or one of several committees when the custody does not survive the master will inquire whether or not it is expedient to appoint a new committee in his place (*n*), and may if he thinks fit appoint a new committee (*o*)

**SECT 4—*Traverse of Inquisition***

Definition

**877** A traverse is the mode in which a decision or verdict finding a person to be a lunatic may be set aside

Application  
 by petition

**878** Any person desiring to traverse an inquisition may, within three months next after the day of the return of the inquisition, present a petition for that purpose The judge in lunacy will hear and determine the application and if the prayer of the petition is granted the order for a traverse will limit a time not exceeding six months within which the petitioner and all other proper parties (*p*) must proceed to the trial of the traverse (*q*) A petitioner who is not the object of the inquisition may be ordered within three weeks of the judge's order to give security to, and to the satisfaction of, the master to proceed to trial within the time limited (*a*)

Lunatic has  
 right to leave  
 to traverse.

**879** Leave to traverse an inquisition is so far as the lunatic himself is concerned a matter of right (*b*) and the only discretion the court has before granting his application is to satisfy itself

(*g*) *Lx parte Ludlow* (1831) 2 P Wms 635

(*h*) *Re Leacocke a Lunatic* (1858) L & G temp Plunk 498

(*i*) *Lx parte Ludlow supra*

(*k*) Lunacy Act 1890 (53 & 54 Vict c 5) s 108 (2)

(*l*) *Ibid* see p 433 *post*

(*m*) Rules in Lunacy 1892 r 69

(*n*) *Ibid* r 79

(*o*) *Ibid* r 80

(*p*) It is the practice to serve the heir at law and next of kin with the petition for a traverse (*Le Gihrist* [1901] 1 Ch 1 C A)

(*q*) If the judge in lunacy makes an order on the petition for a traverse the Attorney General is served with the order pleadings are delivered and an issue is taken in the King's Bench Division before a judge and jury either in Middlesex or at the assizes

(*a*) Lunacy Act 1890 (53 & 54 Vict c 5) s 101 It should be noted that a finding of sanity is peremptory in the first instance (*Hume v Burton* (1785) 1 Ridg Parl Rep 204 213)

(*b*) There must of course be some evidence (even though it be of a very weak nature) in support of the petitioner's case

that the application is made *bona fide* that the petitioner is competent to exercise volition and that he understands what he is doing. These facts are usually ascertained by a personal interview between the judge in lunacy (c) and the petitioner (d). Leave to traverse is apparently also a matter of right in the case of any person other than the lunatic who has an interest (e), such as the lunatic's heir at law (f) an alienee from him (g) or a person who has entered into a contract with him (h). But there is a discretion to refuse an application for a traverse by an entire stranger without any interest (i), or by a husband whose marriage it might be desirable to impugn in the interests of his lunatic wife (k).

SECT 4  
Traverse of  
Inquisition  
Rights of  
other parties

**880** Any person who does not apply for a traverse within three months next after the day of the return of the inquisition or who refuses or neglects for three weeks after the date of the judge's order to give security (if ordered) or who does not proceed to trial within six months from the date of the said order, will be absolutely barred of the right of traverse provided that the judge may in the special circumstances of any particular case extend the time upon such terms as he thinks just (l).

Circumstances  
barring right  
to apply

**881** If the judge in lunacy (c) is dissatisfied with the verdict returned upon a traverse he may order one or more new trial or trials thereon as he thinks fit, but no person will be admitted to traverse more than once (m).

New trial

**882** A traverse of a verdict upon an issue tried in the High Court will not be allowed but the judge in lunacy may if he thinks fit upon application within three months next after the trial of such issue order a new trial of the issue or a new inquisition as to the insanity of the alleged lunatic subject to such directions and upon such conditions as to the judge may seem proper (a).

No traverse of  
High Court  
verdict.

#### SECT 5—Superseding Inquisition

**883** When a person of unsound mind so found by inquisition recovers his sanity he should apply by petition (b) for a

Application  
by petition

(c) As to the judge in lunacy see p 412 *ante*

(d) *Re Gilchrist* [1907] 1 Ch 1 O A *Re Cumming a Person of Unsound Mind* (1802) 1 De G M & G 337 O A *Re Budge a Person of Unsound Mind* (1841) Cr & Ph 338 *Sherwood v Sanderson* (1815) 19 Ves 280

(e) *Re Cumming a Person of Unsound Mind supra*

(f) *Re Roberts* (1746) 3 Atk 308

(g) *Sherwood v Sanderson supra*

(h) *Ex parte Hall* (1802) 7 Ves 261

(i) *Ex parte Ward* (1801) 6 Ves 579

(k) *Re Fust* (1787) 1 Cox Eq Cas 418

(l) Lunacy Act 1890 (53 & 54 Vict c 5) ss 101 102 Orders for the custody of lunatics and the management of their estates may be made and will take effect notwithstanding that proceedings for a traverse are pending (*ibid* s 108 (4))

(m) Lunacy Act 1890 (53 & 54 Vict c 5) s 103 The method of making an application for a new trial is not prescribed by the Rules in Lunacy. It would therefore seem that the application should be by motion pursuant to R S O Ord 39

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 104

(b) A petition for a *supersedeas* should always be in the name of the person who has recovered a sound mind (*Ex parte Stanley* (1750) 2 Ves Sen 25)

**SECT 5** *supersedeas* (c) This petition which will be filed with affidavits of two medical men in support will be brought before the judge in lunacy without previous consideration by the master (d) An order for a *supersedeas* will not be made until the judge has personally seen the patient and received a report on his case from a Chancery visitor (e)

Degree of recovery required

**884** In order that an inquisition may be superseded, it is not necessary that the mind should be restored to its original state competence for common purposes, such as the capacity to make a will of personal estate is sufficient. But the absence of the disorder especially if of a dangerous tendency must be satisfactorily proved by the evidence of persons having competent knowledge of the whole subject not only as to the present state of the party, but with reference to all the former evidence (f)

*Supersedeas upon terms.*

**885** If it appears to the judge that it is not expedient nor for the benefit of the lunatic that the commission should be unconditionally superseded he may upon the consent of the lunatic and any other persons whose consent he deems necessary, order the commission to be superseded upon such terms and conditions as he thinks proper (g)

*Supersedeas in part*

The judge in lunacy if satisfied that a lunatic so found by inquisition is cured or capable of managing himself, and not dangerous to himself or others though incapable of managing his affairs may supersede the inquisition so far as the same finds that the lunatic is incapable of managing himself and rescind or vary any order for the commitment of the person of the lunatic (h)

Effect of completion of *supersedeas*

**886** Upon the completion of a *supersedeas* the lunacy jurisdiction over the patient is ended but application must be made to the master by summons (i) for the passing of a final account by the committee of the estate and his discharge, for the transfer of any securities or documents in the possession of the court or the committee of the estate for taxation and payment of costs and for any other ancillary matter

(c) Rules in Lunacy 1892 r 17 Rule in Lunacy 1900 (a)

(d) Rules in Lunacy 1892 r 18

(e) *Re Dyce Sombre a Lunatic* (1844) 1 Ph 436 *Re Gordon* (1847) 2 Ph 242

(f) *Ex parte Holyland* (1800) 11 Ves 9 The medical affidavits in support of the petition should state that the deponents have perused the evidence filed on the inquisition that they appreciate the nature of the illness the patient was formerly suffering from and that he has now recovered

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 105 under which the judge not infrequently requires a settlement of the patient's property to be executed before the *supersedeas* is granted or he may partially supersede the inquisition that is determine the custody of the person

(h) Lunacy Act, 1890 (53 & 54 Vict c 5) s 106 Application for a partial *supersedeas* should be made by petition in the same manner as an application for a complete *supersedeas* and notice of the application should be given to the committees of the estate and person and also notice of the order. A lunatic in whose favour a partial *supersedeas* has been ordered remains a person of unsound mind for all purposes other than the control of his own person (compare *Re Townshend* (Lord) *Settlement Townshend* (Lord) v *Robins*, [1908] 1 Ch. 201)

(i) Rules in Lunacy, 1892 r 19 As to final accounts see p 435 post

SECT 6—*Transmission of Proceedings*SECT 6  
Trans-  
mission of  
Proceed-  
ingsAs between  
England and  
Ireland

**887** When it is desired that an inquisition taken or a writ of *superseatas* issued in England or Ireland should be acted upon in Ireland or England the proper officer may, under order of the judge in England or the Lord Chancellor in Ireland as the case may be transmit a transcript of the record of the inquisition or of the writ to the Registrar in Lunacy in Ireland, or the High Court in England as the case may be which transcript will thereupon be entered and be of record there respectively and will when so entered, and if and so long only as the Lord Chancellor in Ireland and the judge in lunacy in England as the case may be thinks fit be acted upon by them respectively and be of the same validity and effect to all intents and purposes as if the inquisition had been taken or the writ issued in Ireland or England respectively (*k*)

SECT 7—*Inspection of Records*

**888** A finding of insanity on an inquisition can be read in subsequent proceedings between third parties but only as evidence of the lunacy. Such a finding is *prima facie* evidence against strangers but is not conclusive as between them and can be traversed (*l*). This should be borne in mind in considering the question of applying for liberty to inspect the records filed in the Lunacy Office. Effect of finding.

**889** An order of the judge in lunacy must be obtained before the records and documents filed in the Lunacy Office can be inspected (*m*) whether they relate to a lunatic still alive (*n*), or to a deceased lunatic (*o*). Liberty to inspect will however be given to any applicant on satisfying the judge in lunacy that it is required for a reasonable and proper purpose, provided that the lunatic if alive, is not injured thereby (*p*). But inspection of the reports made to the court by its medical advisers is never permitted (*q*) and reports of the visitors in lunacy (*r*) are secret and not open to the inspection of any person except members of the Board of Visitors (*s*). Leave required

(*k*) Lunacy Act 1890 (53 & 54 Vict c 5) s 10. Where an order in lunacy has been made in Ireland by the court having jurisdiction for that purpose and a transcript of the record has been transmitted to this country the judge in lunacy must treat the order as a binding order and has no jurisdiction to entertain an application either for the purpose of setting aside the proceedings in Ireland or for a *superseatas*. Any such application must be made to the court which originally made the order (*Re Lalbot (an Alleged Lunatic)* (1882) 20 Ch D 269 C A). The practice is to appoint a committee of the estate in England.

(*l*) *Hill v Clifford* *Clifford v Timms* *Clifford v Phillips* [1907] 2 Ch 236 C A *per* COZENS-HAILEY M R at pp 244 245 where the following cases are examined and approved *Sergeson v Sealey* (1742) 2 Atk 412 *Faulder v Silk* (1811) 3 Camp 126 *Van Grutten v Foxwell* *Foxwell v Van Grutten* [1897] A C 658

(*m*) *Re Strachan (H W) (an Alleged Lunatic)* [1895] 1 Ch 439 C A

(*n*) *Re Sartoris Lunacy* *Wylde v Arnold* (1862) 1 New Rep 4 C A

(*o*) *Re Silcock's Lunacy* *Hutton v Hutton* (1862) 1 New Rep 4 C A

(*p*) *Re Strachan (H W) (an Alleged Lunatic)* *supra*, *Re Wood Banner v England* (1863) 4 De G J & Sm 134 C A

(*q*) *Re Strachan (H W) (an Alleged Lunatic)* *supra*.

(*r*) As to visitors in lunacy and the Board of Visitors, see pp 467 *et seq* *post*

# **SECT 7** **Inspection** **of Records**

Destruction of reports

Report by medical witness

Supply of documents under which patient confined

and the judge in lunacy and persons appointed by him (s) On the patient's lunacy being superseded, or vacated and discharged, these reports must be destroyed within fourteen days unless by order of the judge the destruction is postponed till the patient's death when they must in any case be destroyed (t)

While an inquiry as to an alleged lunatic's sanity is pending the medical report obtained by the petitioner under an order for the examination of the patient by the medical witness cannot be inspected by the respondent (u)

**890** Any person applying to the Commissioners in Lunacy *bona fide* on behalf of a lunatic then confined ought to be furnished with the documents or copies of the documents under which the lunatic is confined (v) After the discharge of any person who considers himself to have been unjustly confined as a lunatic the secretary to the Commissioners must if requested supply to him free of expense a copy of the reception order and certificate under which he was confined and if the order was made on petition of the petition and particulars upon which the order was made (u)

## **Part VII — Appointment of Quasi-Committee without a Finding of Lunacy**

Persons in respect of whom *quasi* committee may be appointed

**891** Under the Lunacy Act 1890 (x) s 116 orders may be made for the appointment of a *quasi* committee (a) with powers of management and administration in the case of the following persons that is to say —

(1) A person lawfully detained as lunatic though not so found (b)

(s) Lunacy Act 1890 (33 & 34 Vict c 5) s 156 (1)

(t) *Ibid* s 186 (2) Production of these reports was refused in a probate action where the issue was the testator's testamentary capacity but it is doubtful whether in such a case the visitor would not be directed on *subpoena* to give the effect of the report or his notes for their preparation (*How v New* [1893] P 55) Lord Esher M R and Bowen LINDLEY LOFTS and KAY JJ concurred in the view that reports though existing after a patient's death must be treated as destroyed and further that even on a *subpoena* the witness who made the reports would be bound so to treat them Had it been possible to obtain production of the reports they would not *per se* have been evidence but they might have been useful in testing the accuracy of the memory of the witness (*How v New supra per BLANES J* at p 57)

(u) *Re B (an Alleged Lunatic)* [1892] 3 Ch 194 C A

(v) *Re Dell* (1891) 91 L T Jo 315 *per* JELINE J As to inspection of documents of an alleged lunatic see *Re Cathcart* [1902] W N 80 C A

(w) Lunacy Act 1890 (33 & 34 Vict c 5) s 82

(x) *Ibid* s 116

(a) As to the use of the expression *quasi* committee see note (p) p 410 *ante*

(b) Lunacy Act 1890 (33 & 34 Vict c 5) s 116 (1) (c) Lawfully detained means detention under the provisions of Acts of Parliament of this country it does not mean detention in a foreign country (*Re Watkins* [1896] 2 Ch 336 C A) The detention may be under a reception order made by a judicial authority (Lunacy Act 1890 (33 & 34 Vict c 5) s 4 see p 499 *post*) or in a workhouse under a magistrate's order (Lunacy Act 1890 (53 & 54 Vict c 5) s 24 see p 499

(2) A person proved to be of unsound mind and incapable of managing his affairs, the capital value of whose property does not exceed £2,000 or whose annual income does not exceed £100 (c) The proof may be in the form of the certificate of a master, or the report of the Commissioners in Lunacy or by affidavit or otherwise

(8) Criminal lunatics while insane and under confinement (d)

(4) Any person not detained and not found lunatic, but being through mental infirmity, arising from disease or age, incapable of managing his affairs (e)

**892** In any of the above cases all powers which if there had been a finding of lunacy could have been exercised by the committee of the estate may be exercised by the *quasi* committee in such manner as the judge or subject to the Rules in Lunacy a master may direct (f)

Exercise of  
powers

There may be conferred on such a *quasi* committee authority

Special  
authority

post) or under the Idiots Act 1854 (41 & 50 Vict c 20) (*Re Whalley (Marl)* and *Re Whalley (H R)* [1906] 1 Ch 560 C A see p 526 post) Proof of detention is furnished by the medical affidavit which exhibits copies of the medical certificates under which the reception order was made together with a copy of such reception order. If the reception order has expired application must be made to the Commissioner in Lunacy for a continuation order see p 512 post

(c) Lunacy Act 1890 (53 & 54 Vict c 5), s 116 (1) (c). To ascertain whether the property comes within this provision the lunatic's debts and the expenses incurred in his past maintenance since he became of unsound mind are to be deducted (*Re Tancloth (a Supposed Lunatic)* (1849) 13 Ch D 301 C A. *Re Adams* (1864) 9 L J 626. *Re Sandford a Lunatic* (1849) 1 Mac & G 335)

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (f). A criminal lunatic is — (a) Any person for whose safe custody during His Majesty's pleasure His Majesty or the Admiralty is authorised to give order or (b) any prisoner whom a Secretary of State or the Admiralty has in pursuance of any Act of Parliament directed to be removed to any asylum or other place for the reception of insane persons (Lunacy Act 1890 (53 & 54 Vict c 5) s 341. Criminal Lunatics Act 1884 (47 & 48 Vict c 64) s 16) and see title CRIMINAL LAW AND PROCEDURE Vol IX p 352 note (k). Maintenance of a criminal lunatic is defrayed out of moneys provided by Parliament (Criminal Lunatic Act 1884 (47 & 48 Vict c 64) s 10). But where a lunatic subsequently becomes entitled to property past maintenance is recoverable by the Treasury as a Crown debt and the Statutes of Limitation do not apply (*Re J* (1909) 161 T Jo 350 C A). The court in lunacy has no power over the person of the patient (*Re Pearce Ex parte Clark supra*)

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (d). In practice it has been held that nearly every case which is not otherwise within the lunacy jurisdiction is covered by this provision. Thus orders have been made thereunder dealing with the property of (a) idiots not detained (b) aliens detained as lunatics in asylums abroad but with property in England and (c) English subjects detained as lunatics in asylums abroad but with property in England or in an English colony. In applications under this provision no reference to lunacy, the master in lunacy or the Lunacy Acts is made and a special seal is kept by the officials wherefrom all such words are eliminated. The medical evidence must show that the patient is through mental infirmity arising from disease or else that he is through mental infirmity arising from age incapable of managing his affairs and proof of actual lunacy should be avoided see *Re Browne* [1894] 3 Ch 412 416, C A

(f) Lunacy Act 1908 (8 Edw 7 c 47) s 1



**PART VII**  
**Appoint-**  
**ment of**  
**Quasi Com-**  
**mittee etc**

General  
 authority  
 Procedure on  
 application  
 for appoint-  
 ment of *quasi*  
 committee

to do or exercise any specified act or power, or general authority to exercise all or any of such powers without further application to the court (*q*) The *quasi* committee is subject to the jurisdiction of the court in the same manner as a committee of the estate of a lunatic so found (*h*)

**893** The application for the appointment of a *quasi* committee should be by summons (*i*), seven clear days notice of which must be given to the alleged lunatic by service on him of a copy of the summons, with a notice indorsed thereon signed by the applicant or a solicitor (*k*) The alleged lunatic may within seven days from the date of service file a notice of objection which notice must be signed by himself and witnessed by a solicitor (*l*) Should the lunatic object to the proceedings and file evidence in support of his objection the matter will exercise his discretion He may, according to the circumstances, (1) make the order as asked or (2) visit the alleged lunatic (*m*) or (3) send a visitor in lunacy to see him and report (*n*), or (4) direct the applicant to present a petition for an inquisition (*o*) or (5) make no order

Choice of  
*quasi* com-  
 mittee

The choice and desirability of a *quasi* committee will be governed by rules similar to those which apply to the choice and desirability of a committee of the estate (*p*) and maintenance voluntary allowances payment of debts etc will be dealt with on the same footing whether the lunatic is or is not so found (*q*)

Effect of  
 cessation of  
 detention,

**894** Where a *quasi* committee has been appointed of the property of a person detained as a lunatic though not so found the cesser of detention will not discharge him but he must, if the patient has recovered apply in lunacy to be discharged (*r*)

## Part VIII — Judicial Powers over Person

### SECT 1 — *In General*

*Quasi* com-  
 mittee has no  
 direct control

**895** In the case of a lunatic not so found a *quasi* committee of whose estate has been appointed under the Lunacy Act, 1890 (*a*)

(*g*) Lunacy Act 1908 (8 Ldw 7 c 47) s 1 as to difficulties which arise prior to this Act see *Re Baggs (a Person of Alleged Unsound Mind)* (1893) cited [1894] 2 Ch 416 n O A *Re S S B (a Person of Unsound Mind not so Found by Inquisition)* [1906] 1 Ch 713 C A

(*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (*j*)

(*i*) Rules in Lunacy 1891 r 19 As to the practice see *ibid* rr 93 94

(*l*) *Ibid* r 48 An affidavit of service must then be filed (*ibid* r 49)

(*l*) *Ibid* r 50 and Forms 9 and 11 in schedule thereto

(*m*) *Ibid* r 52

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 184

(*o*) Rules in Lunacy 1893 r 1

(*p*) See p 423 *ante*

(*q*) Rules in Lunacy, 1891 rr 50 56

(*r*) *Re B A S (a Person of Unsound Mind not so Found)* [1898] 2 Ch 392,

O A

(*a*) 53 & 54 Vict. c. 5

s 116, there is no direct control over the person of the patient but only an indirect one through the power of the purse

SECT 1  
In General

**896** In the case of a lunatic so found the committee of the person has the duty of fixing the residence of the lunatic, regulating his establishment and making provision for his maintenance (*b*) He is also bound to visit the lunatic as directed by the master, and provision is made by statute for visits by the Chancery visitors (*c*)

Duty of committee of person of lunatic so found

#### SECT 2—Maintenance and Accounting

**897** A scheme of maintenance of the lunatic is from time to time settled by the master (*d*) The committee of the person is not required to give security and his liability to account for sums received by him from the committee of the estate is determined by the form of the order made on the summons issued after inquiry found (*e*) If such order (as is the usual case) allows either the whole net income or a fixed sum per annum for the maintenance of the patient then there is no liability to account (*f*) But if the order allows so much as shall be expended, not exceeding a fixed sum per annum then he must account He will also render himself liable to account if it can be shown that he has not properly maintained the lunatic in accordance with the provisions of the order (*g*) and in any circumstances he must furnish an annual statement of expenditure to the visitors in lunacy (*h*)

Scheme  
No security  
  
Liability to account

#### SECT 3—Residence

**898** The court will not readily grant permission to take a lunatic out of the United Kingdom, though it may where shown to be in the lunatic's interest grant permission for him to travel outside the court's jurisdiction (*i*) or in peculiar circumstances to reside in Scotland on an undertaking by his committee living in England to bring him within the jurisdiction whenever required so to do (*h*), and in the meantime to furnish periodical reports as to his mental and bodily health (*l*)

Rules as to travel out of jurisdiction

Committees of the person must notify any change of residence of their patient within three days to the visitors in lunacy (*m*) and the visitors must without delay report to the Lord Chancellor when they are unable to discover the residence of any lunatic whom they intended to visit (*n*)

Notification of change of residence

(*b*) Pope Law and Practice of Lunacy 2nd ed 108 Elmer Practice in Lunacy 180

(*c*) See p 469 *post*

(*d*) See further as to settlement of schemes for maintenance p 437 *post*

(*e*) See as to this summons Rules in Lunacy 1892 r 31 and p 423 *ante*

(*f*) *Re French* (1868) 3 Ch App 31

(*g*) *Strangways v Read* [1895] 2 Ch 419

(*h*) Rules in Lunacy 1892 r 107 As to the visitors in lunacy see pp 467 *et seq post*

(*i*) *Re Hackett a Lunatic* (1854) 3 I Ch R 375

(*k*) *Re Jones a Lunatic* (1844) 1 Ph 461

(*l*) The old practice referred to in *Re Stair* (1846) 1 Coop temp Cott. 227, requiring security for the lunatic's return within the jurisdiction is now obsolete

(*m*) Rules in Lunacy 1893 r 11 As to the visitors in lunacy see pp 467 *et seq post*

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 185 (2)

## Part IX —Judicial Powers over Estate

### SECT 1

#### Committees and Quasi Committees

Agent of the Crown

Duty to act under direction of court

Remuneration

Employment of agent

Who may be appointed

### SECT 1 —Committees and Quasi Committees

#### SUB SECT 1 —Position of Committee or Quasi Committee

**899** A committee or quasi committee is the agent of the Crown (o). He should in all important matters outside the scope of his order act under the directions of the court to be obtained on summons (a). If he neglects to obtain such directions he will be liable for the wrong exercise of his discretion and sometimes for the exercise of any discretion at all (b). He is liable only to the court and in the absence of misconduct by him the interference of third parties with his management of the estate will not be tolerated (c).

He does not generally receive a salary but there may be exceptional cases in which he ought to be paid one (d). In no circumstances will he be allowed apart from salary to make a profit out of the estate (e).

**900** In exceptional cases involving much time and labour in collecting rents and managing a large estate the committee or quasi committee may be authorised to employ an agent at a proper salary.

A trustee (f) solicitor or other accounting party (g) will not usually be appointed and the agent must not act or exercise his discretion in questions of difficulty without the leave of the court such leave being applied for and obtained by the committee or quasi committee (h).

(o) *Re Itzgerald a Lunatic* (1905) 2 Sch & Lef 432

(a) Rules in Lunacy 1892 i 19

(b) Money spent without the sanction of the court first obtained on buildings and improvements will be disallowed (*Foster v Marchant* (1684) 1 Vern 262 *Ex parte Marton* (1800) 11 Ves 39; *Ex parte Hulbert* (1800) 11 Ves 397) although the expenditure is to the advantage of the estate (*Re Langham a Lunatic* (1841) 2 Ph 299). The letting of property on his own responsibility and at an inadequate rent will render the committee or quasi committee liable to make good the deficiency and all costs (*Le Willins* (1842) 6 Jur 308) as also will his failure to take steps to recover money due or to obtain directions thereon (*Re Swindell Ex parte Swindell Ex parte Ordish* (1851) 2 De G M & G 91 (A)). He must not use his own judgment on a question of title (*Wright v Chand* (1860) 6 Jur (N S) 416) nor must he sue or defend without leave (*Re Votley a Lunatic* (1839) 3 Jur 719) see also *Re R S A* [1901] 2 K B 32 and p 462 *post*.

(c) *Re Hutchin* (1840) 15 L J (Ch) 128. As to the effect of an order authorising a committee or quasi committee to carry on a lunatic's business see p 445 *post*.

(d) Such exceptional cases would arise where there were a large number of rents to be collected and a number of houses to be managed (see *Re Errington Ex parte Kermor* (1821) Jac 404 *Re Walker a Lunatic* (1848) 2 Ph 630 *Re Westbrooke* (1848) 2 Ph 631).

(e) *Cope v (Lady Mary) Case* (1677) 2 Cas in Ch 239

(f) *\_\_\_\_\_ v Jolland* (1802) 8 Ves 72

(g) *Ex parte Pincke* (1811) 2 Mer 462 and see p 423 *ante*

(h) *Re Kilkenny (Earl) a Lunatic* (1845) 7 I Eq R 594. An agent cannot lay out moneys on repairs at his own discretion (*Blunt v Clitherow* (1802) 6 Ves 799) nor lease property (*Morris v Elme* (1890) 1 Ves 139) nor raise rents, turn out tenants nor let even for one year without leave (*Wynne v Newborough*

The agent will usually be required to give security to account for his receipts and to deal with the same as may be directed (\*)

SECT 1  
Committees  
and Quasi  
Committees

SUB SECT 2—Security

**901** The committee of the person is not required to give security, but the committee of the estate is always required to give security unless it is impossible to find a person who will act as committee with security (j) A *quasi* committee may be appointed either with or without security (k) The appointment whether of a *quasi* committee appointed with security or of a committee of the estate takes effect only on the completion of his security (l)

Duty of agent  
From whom  
security  
required

The security is approved by the master who may from time to time increase or reduce it (m) It usually consists of a bond with two sureties or with a guarantee society in a penal sum equal to double the value of the lunatic's income passing through the committee's or *quasi* committee's hands in each year Alternatively a committee or *quasi*-committee of the estate may give security in whole or in part by bringing money or stock into court (n)

Nature of  
security

The general rule is that the committee of the person shall not be surety for the committee of the estate but in special circumstances this rule may be relaxed (o) A surety is always required to justify before appointment He is liable not only for the balance due on the committee's or *quasi* committee's accounts but also for the costs of all proceedings subsequently taken for the purpose of enforcing payment of such balance and this rule applies though he had no notice of the default of his principal until after proceedings were taken (p) He is also liable for the

Sureties

Liability

(Lord) (1790) 1 Ves 160 and if he commences proceedings duly authorised in the wrong form he may be deprived of his costs (*Re Montgomery* (1828) 1 Mol 419) He may distrain for one year's arrears of rent without leave but for more leave is necessary (*Brandon v Brandon* (1821) 5 Mudd 473) There are some old cases in which paid agents were appointed because the committee of the estate could not give security or there was no suitable person for the post of committee (*Re Billinghamst a Lunatic Ex parte Billinghamst* (1750) 1 Amb 104 *Ex parte Warren* (1800) 10 Ves 622 *Re Rudcliffe Ex parte Rudcliffe* (1820) 1 Jac & W 639) In the present day in such a case the official solicitor (see title COURTS Vol IX p 71) would be appointed committee or *quasi* committee as the case might be

(s) Rules in Lunacy 1892 r 83 and see *Re Errington* (1826) 2 Russ 567 Failure to pass accounts when due will render the agent liable to payment of interest on his balances (— *v Jolland* (1802) 8 Ves 72) It is perhaps unfortunate that the description of the agent as 'receiver' in force prior to the Lunacy Act 1890 (53 & 54 Vict c 5) should have been perpetuated at the present day since the rule as drawn is liable to be read as applying (which it does not) to persons appointed under the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 As to the use of the term *quasi* committee see note (p) p 410 ante

(j) *Re Frank* (1826) 2 Russ 40

(k) Lunacy Act 1908 (8 Edw 7 c 47) s 1

(l) Lunacy Act 1890 (53 & 54 Vict c 5) s 108 (2) Rules in Lunacy 1892 r 55 117

(m) Rules in Lunacy 1892 rr 50 56 70 As to the discharge of securities see *ibid* rr 72 81 Rules in Lunacy 1893 r 9

(n) Rules in Lunacy 1892 r 71

(o) *Re Burton Ex parte Mount* (1851) 21 I J (OH) 221 O A

(p) *Re Lockey a Lunatic* (1845) 1 Ph 509

**SECT 1**  
**Committees**  
**and Quasi**  
**Committees**

**Effect of**  
**death of**  
**patient.**

costs of the removal of his principal and the appointment in the latter's place of a new committee or *quasi* committee (*q*)

The death of the patient does not discharge the committee or *quasi* committee from liability to account in lunacy for sums received in his fiduciary capacity, but after death he no longer receives moneys as committee or *quasi* committee and though personally liable therefor, his sureties are not liable to make good moneys which it was no part of his duty as committee or *quasi* committee to receive (*r*)

**Replacing**  
**surety**

If a surety is dead or has compounded with his creditors or otherwise become insolvent a new bond with new sureties must be entered into and the executors of a deceased surety may obtain an order that, in default of fresh security being given, another committee or *quasi* committee be appointed (*s*)

**Enforcing the**  
**bond**

In serious cases of either nonfeasance or misfeasance his bond may be put in suit against him (*t*)

**SUB SECT 3—Lodgment of Deeds Money Wills etc in Court**

**Deposit of**  
**deeds etc**

**902** In order to reduce the amount of security to be given by a committee or *quasi* committee or for the purposes of safe custody, the master may receive any deed or security and may by order or certificate give liberty for payment or transfer into court of any money or stock belonging to the lunatic (*u*) Documents deposited in court will, during the lunatic's lifetime only be handed out to the committee or *quasi* committee on evidence proving that they are required for the purpose of properly managing the lunatic's estate (*w*) On a *supersedeas* or the death of the lunatic the master may order the delivery or payment out of any deeds or money (*x*)

**Transfer of**  
**money etc**  
**into court**

**Production of**  
**deposited**  
**documents**

The court will order production of deposited documents to any person who makes out a *prima facie* case that he is interested in them or the property to which they relate (*y*) but an order cannot be made on the committee in an action to produce such documents, since they are not under his control (*a*)

**Deposit of**  
**testamentary**  
**papers**

**903** Any person in whose custody or control any testamentary paper of the lunatic is may upon oath, deposit the same in the Lunacy Office for safe custody (*b*)

(*q*) *Re Graham Graham v Noakes* [1895] 1 Ch 66

(*r*) *Re Walker* [1907] 2 Ch 120 C A and see *Re Butler* (1866) 1 Ch App 607

(*s*) *Re Bull* (1843), 2 Coop temp Cott 63

(*t*) *Re Hall a Person of Unsound Mind Deceased* (1863) 1 De G J & Sm 487 C A

(*u*) Rules in Lunacy 1892 r 44 *Re Eagle a Lunatic* (1847) 2 Ph 201,

(*w*) *Re Cooper* (1836) 1 M, & C 1 33

(*x*) Rules in Lunacy 1892 r 46

(*y*) *Re Smyth (a Lunatic)* (1850) 15 Ch D 286 C A *Re Smyth (a Lunatic)* (1881) 16 Ch D 673 C A *Re Strachan (H W) (an Alleged Lunatic)* [1895] 1 Ch 439 444 C A As to the inspection of records of proceedings in lunacy 427 ante

*Vivian v Little* (1883) 11 Q B D 370

(*b*) Rules in Lunacy, 1892 r 45 and see *Re Humpleby* (1829) 2 Coop temp Cott 166 *Re Thompson* (1830) 1 Russ & M 30. The alleged will must be enclosed in a sealed cover and handed to one of the lunacy officials who will give a receipt for it.

The master may on being satisfied of a lunatic and read any document deposited with him purporting to contain any testamentary disposition made by the lunatic for purpose of ascertaining who is therein nominated executor, and whether any direction is contained concerning his funeral or place of interment (d), and may deliver the document to the proper officer of the Probate, Divorce and Admiralty Division of the High Court to be dealt with according to law (e)

SECT 1  
Committees  
of Lunatics  
or Quasi  
Committees  
Delivery  
thereof to  
proper officer

#### SUB SECT 4—Accounts

**904** The committee of the estate (f) or the quasi committee (g) must annually, or at such other times as the master may fix deliver his account or an affidavit in lieu of account and attend at the Lunacy Office to vouch the same (h). When the account has been vouched and the cost of passing it assessed the balance due from the committee or quasi committee (g) must be ascertained and such balance if sufficiently large paid into court to the credit of the lunacy and invested and the dividends unless otherwise directed, accumulated without further request (i). The accounts as vouched are then to be copied by the lunacy stationers and an affidavit indorsed at the foot or end thereof and sworn proving the correctness of the figures and that the committees or quasi committees (g) sureties are living and that neither of them has

Delivery  
Vouching  
Payment of  
balance into  
court  
Affidavit of  
verification

(c) The lunatic's death and identity must be strictly proved (*Ex parte Tormor* (1852) 1 W R 43 O A)

(d) *Re Montague a Lunatic Ex parte Farrar* (1838) 2 Jur 462

(e) Rules in Lunacy 1892 r 47 The solicitor having the carriage of the matter draws up a request (with a £1 impressed stamp thereon) that the will may be handed to the officials at the principal probate registry. An appointment is then given for the solicitor to attend with one of the lunacy officials at the registry when the will is handed over on payment of a 10s lodgment fee in stamps. A copy of the will is bespoken at the principal registry from which copy the endorsement for probate is made and the executor's oath exhibiting the original will must be sworn either before an official at the principal registry or by request the original will may be sent to a district registry to be there deposited to. As to common form practice in probate matters see title EXECUTORS AND ADMINISTRATORS, Vol XIV pp 165 *et seq*

(f) For cases in which the committee of the person is liable to account see p 431 *ante*

(g) Rules in Lunacy 1892 r 84

(h) *Ibid* r 73 Failure to pass accounts regularly may involve the disallowance of costs (*Ex parte Clarke* (1791) 1 Ves 296). With the account there should be lodged at the Lunacy Office office copies of the order appointing the committee or quasi committee and of all other orders dealing with the patient's estate all vouchers certificate and transcript of the fund in court (if any) certificate of the last payment into court and the costs of passing the account for assessment in chambers. In small cases a short statement is sometimes accepted in lieu of an account. In large and complicated cases the master sometimes refers the account to a chartered accountant.

(i) Rules in Lunacy 1892 r 76 (see rr 55 56). On default of payment in he may lose his costs and be charged interest (*ibid* r 78 *Ex parte Cotton* (1790) 1 Ves 156 *Ex parte Clarke supra*). There is some objection at the Lunacy Office to certifying a balance as due from a patient's estate. Where therefore it appears on the vouching of a committee's or quasi committee's account that a balance is due to such committee or quasi committee the payments and receipts are certified as equal, and the surplus of payments (i.e. the balance due from the patient's estate) are carried forward to the next account and there included as a debit.

SECT 1  
Committees  
and Quasi  
Comm.  
Office copy

LUNATICS AND *compounded with his creditors (k)*  
been adjudged *has returned to the Lunacy Office and the lunacy*  
The *rules* make an office copy thereof, which with the contents  
thereof are sufficiently authenticated by the seal of the master's  
office (l)

SECT 2—*Extent of Powers of Management and Administration*

SUB SECT 1—*As to Property in Ireland and Scotland*

Property  
in Ireland of  
lunatic so  
found

**905** The powers of management and administration in the case of lunatics so found without inquisition or other proceedings in Ireland extend to the lunatic's personal property in Ireland where it does not exceed £2 000 in value or the income thereof does not exceed £100 a year and the like powers of management and administration conferred by the Lunacy Regulation (Ireland) Act 1871 (m) extend without inquisition or other proceedings in England to the lunatic's personal property in England where it or the income thereof does not exceed the above mentioned amount (a)

Of person of  
unsound  
mind

The powers of management and administration in cases where the property of a person of unsound mind does not exceed £2 000 or the income thereof does not exceed £100 per annum (b) and the powers conferred by the Lunacy Regulation (Ireland) Act 1871 (c) s 68 extend to the property in Ireland or England, as the case may be of the lunatic where the total value of the property both in England and Ireland does not exceed £2 000 in value or the income thereof does not exceed £100 a year (d) and an order of a master in England under this provision thus enables the English *quasi* committee to deal with the Irish real or personal property of the lunatic

Property in  
Scotland of  
lunatic so  
found

**906** Where a lunatic with personal property in Scotland has been so found in England or Ireland, the committee of the estate without cognation or other proceedings in Scotland has the same powers over such property or the income thereof as might be exercised by a Scottish tutor at law after cognation or a duly appointed *curator bonis* (e) and where a tutor at law after cognation or a

(k) Rules in Lunacy 1897 r 70

(l) Rules in Lunacy 1897 r 8

(n) 34 & 35 Vict c 22 ss 60—96 inclusive

(o) Lunacy Act 1890 (53 & 54 Vict c 5) s 131 (1) When a lunatic has been so found in England the appointment of the committee of the person rests with the master in lunacy in England although the lunatic's property is in Ireland and a transcript of the record of the inquisition has been transmitted to that country with a view to the appointment of a committee of his estate by the Lord Chancellor in Ireland (*h Lottenham* (1837) 2 My & Cr 39) For inquiries which may be made in England as to the property of a lunatic residing out of the jurisdiction see Rules in Lunacy 1892 r 30 Where the personal property exceeds £2 000 in value or the income thereof exceeds £100 a year or there is real estate it is necessary to obtain the appointment of a committee of the estate in Ireland or England as the case may be As to transmission of proceedings see p 421 ante

(b) That is in all cases in which a *quasi* committee is appointed under the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (e) see p 429 ante

(c) 34 & 35 Vict. c 22

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 131 (4)

(e) *Ibid* s 131 (2) An English committee can maintain an action in the

*curator bonis* has been appointed to a lunatic in Scotland who has personal property in England or Ireland, the tutor or *curator bonis* without an inquisition or other proceedings in England or Ireland has the same powers over such property or the income thereof as might be exercised by a committee of the estate in England or Ireland (f)

SECT 2  
Extent of  
Powers of  
Manage-  
ment etc

SUB SECT 2 — *Maintenance and Voluntary Allowances*

**907** In the case of a lunatic so found the master at the inquiry, which immediately succeeds the finding (g) settles a scheme of maintenance which may from time to time be resettled (h) In certain specified cases (i) an order for administration and management which includes maintenance is usually made on the appointment of the *quasi* committee

Scheme for  
maintenance  
Order for  
administra-  
tion includes  
maintenance

**908** In administering a lunatic's property the primary considerations are his maintenance and welfare (l) what is best to do in his own interest what is most expedient in managing his estate (l) and what fund (if more than one is available) can from his point of view be most advantageously charged with his maintenance (m) If he has a life interest in one property as well as other property to which he is absolutely entitled the court will apply the life interest first for maintenance (n) Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income and for solid enjoyments and substantial comfort the court will if necessary go beyond the bounds of income (o)

Primary con-  
siderations

In cases of small estates where the income is insufficient to produce the requisite maintenance it is a common practice to have

Recourse to  
capital in  
small estates

Scottish courts in respect of his lunatic's personal estate but not in respect of such lunatic's real estate (*Grant v Thomson* (1835) 13 Sh (Ct of Sess) 878 *Grdon v Staur (Earl)* (1855) 13 Sh (Ct of Sess) 1073) This provision applies only to lunatics so found When a lunatic was not so found Scottish companies could formerly refuse to transfer Scottish securities in accordance with a master's order Whether a *quasi* committee appointed under the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 could now pursuant to the Lunacy Act 1908 (8 Edw 7 c 47) s 1 be clothed with the powers of a committee as regards personal estate in Scotland has not yet been decided But probably the masters would hold that they had jurisdiction to authorise such a *quasi* committee to get in such estate

(f) Lunacy Act 1890 (53 & 54 Vict c 5) s 131 (3) As to the curator's power to sue see p 463 *post*

(g) See p 423 *ante*

(h) See Pope Law and Practice of Lunacy 2nd ed 109

(i) *See* persons within the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (o)

(d) (e) (f) see pp 428 429 *ante*

(k) *Re Plenderleith a Person of Unsound Mind not so Found by Inquisition* [1893] 3 Ch 332 *Re Wylie* [1894] 2 Ch 519 C A Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (4) Rules in Lunacy 1892 r 31 (g) (h) and see *Re Pink* (1883) 23 Ch D 577 C A The first thing to ascertain is what is for the benefit of the lunatic (*ibid per* LINDLEY L J at p 581)

(l) Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (4)

(m) *Re Ashley* (1830) 1 Russ & M 371 *Gisborne v Gisborne* (1877) 2 App Cas 300

(n) *Re Weaver* (1882) 21 Ch D 616 C A

(o) *Re Perse, a Lunatic* (1829) 3 Mol 94



**SECT 2**  
**Extent of**  
**Powers of**  
**Manage**  
**ment etc**

recourse to capital (p), the ordinary order in such cases being to sell each year sufficient capital to raise with any income the amount fixed for maintenance. A reversionary income may be sold for the same purpose (q), or an annuity may be purchased for the lunatic (r). In making these arrangements no regard is had to any rights or claims of expectants—here at law or next of kin—or of creditors (s).

**Lunatic alone**  
**considered**

These propositions only apply to the lunatic's own maintenance. His wife's claim for maintenance is the same as that of any ordinary creditor (t).

**Allowances**  
**to relations**

**909** In deciding whether to make an allowance out of a lunatic's estate to relations for whom he is not bound to provide the court is guided by a consideration of what the lunatic himself would probably have done if sane (u). Assuming the existence of an ample margin beyond the lunatic's personal requirements the continuation of allowances originated by him to those to whom he stands in *loco parentis* is authorised almost as a matter of course and in a proper case the court would itself originate such allowances. Further than this allowances to other near relations such as collaterals may be made where special claims for consideration can be put forward (v). But it must always be borne in mind that it is not the duty of the court to deal benevolently or charitably with the patient's surplus income (w) and that the tendency should be towards narrowing rather than augmenting voluntary allowances (a).

**Allowance for**  
**maintenance**  
**during tem**  
**porary**  
**insanity**

**910** When it appears that the unsoundness of mind of any lunatic so found is in its nature temporary and will probably be soon removed and that any ready money or income is standing to

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- (p) *Re Persee a Lunatic* (1829) 3 Mol 94  
 (q) *Re Walker Walker v Symons* (1843) 8 Jur 49  
 (r) *Ex parte Stonard* (1810) 18 Ves 285  
 (s) *Re Plenderleith (a Person of Unsound Mind not so Found by Inquisition)* [1893] 3 Ch 332 O A. *Re Winkle* [1894] 2 Ch 519 O A. Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (5)  
 (t) *Re Winkle supra*.  
 (u) *Re Hinde Ex parte Whitbread* (1816) 2 Mer 99. *Re Irost* (1870) 5 Ch App 699.  
 (v) *Re Sparrow (a Person of Unsound Mind)* (1832) 20 Ch D 320 O A. *Re Blair a Lunatic* (1836) 1 My & Cr 300. *Re Croft* (1862) 32 L J (Ch) 481 O A. *Re Berdige* (1883) 50 L T 653 O A. Allowances have been made to a daughter on her marriage including a special allowance to her by way of outfit and for her settlement (*Re Fowler* (1842) 6 Jur 431. *Re Drummond* (1836) 6 L J (Ch.) 58) to a nephew who was heir at law and one of the next of kin (*Re Sparrow (a Person of Unsound Mind) supra*) to collaterals (*Re Blair a Lunatic supra*. *Re Croft supra*) to the lunatic's illegitimate children but not to their mother (*Bradshaw v Bradshaw* (1820) 1 Jac & W 647. *Re Jodrell* (1828) Shelford on Lunatics etc 2nd ed 210) to an old servant as a retiring pension (*Re Carysfort (Earl)* (1840) Cr & Ph 76) for the erection of a church and parochial schools in the immediate neighbourhood of the lunatic's real estate (*Re Strickland* (1871) 6 Ch App 226) and in discharge of a moral obligation treated as a debt of honour (*Re Whitaker (a Person of Unsound Mind)* (1889) 42 Ch D 119 O A).  
 (w) *Re Darling (a Person of Unsound Mind)* (1888) 39 Ch D 208 O A.  
 (a) *Ibid*. *Re Clarke a Lunatic* (1847) 2 Ph 232. *Re Evans (a Person of Unsound Mind)* (1882), 21 Ch D 297 O A.

**SECT 2**  
**Extent of**  
**Powers of**  
**Manage-**  
**ment etc**

the lunatic's account with a banker or agent and is readily available a sum may be allowed thereout for the temporary maintenance of the lunatic or of him and the members of his immediate family dependent upon him, without a grant of the custody of the estate (b) The person authorised to receive and apply the money must account therefor (c), and his receipt is a good discharge to the banker or agent who pays over the same (d)

Pending the appointment of a committee or *quasi* committee the master may by certificate authorise the lunatic's banker or any other person, to pay to the person named in such certificate out of the lunatic's cash or securities such sums as may be proper for the temporary maintenance of the lunatic or of any member of his family (e) The jurisdiction to grant this certificate arises in the case of lunatics so found after the finding (f) and in the case of lunatics not so found when the master is satisfied that the particular matter comes within the Lunacy Act 1890 (g), s 116 so as to justify the making of an order for administration and management (h)

Allowance for maintenance pending appointment of committee

**911** Pensions payable by any public department to any person certified by a justice or minister of religion and by a medical practitioner to be mentally incapable of managing his or her affairs may be paid as to an amount in the discretion of such department to the institution or person having care of such person and as to any balance, for or towards the maintenance of the husband or wife and relatives (i) Where a person entitled to a savings bank annuity or insurance is insane or otherwise incapacitated to act, then subject to certain statutory regulations (k) payment of the annuity or insurance may be made to such persons as may seem proper, and their receipt will be a good discharge (l) If a police pensioner appears to the police authority to be insane or otherwise incapacitated to act, the police authority may pay so

Application of pensions

Savings bank annuity or insurance

Police pensioners

(b) Lunacy Act 1890 (53 & 54 Vict c 5) s 127 (1) This provision applies only to cases in which there is evidence that the lunatic's insanity is not likely to last more than a few months The application for temporary maintenance is made to the master on summons (Rules in Lunacy 1892 r 19) and is authorised by certificate under his hand

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 127 (3)

(d) *Ibid* s. 127 (2).

(e) *Ibid* s 130 (as to lunatics so found) Rules in Lunacy 1892 r 54 (as to lunatics not so found)

(f) Compare Lunacy Act 1890 (53 & 54 Vict c 5) s 130

(g) 53 & 54 Vict c 5 see pp 428 429 *ante*

(h) Compare Rules in Lunacy 1892 r 54 In the former case the application for temporary maintenance should be made immediately after the finding of insanity or subsequently on the summons under Rules in Lunacy 1892 r 31 see p 423 *ante* In the latter case the summons originating proceeding under the Lunacy Act 1890 (53 & 54 Vict c 5), s 116 should ask for what is required

(i) Lunacy Act 1890 (53 & 54 Vict c 5) s 335

(k) *Id* under the Government Annuities Act 1864 (27 & 28 Vict c 43) s 16 (which enables the Postmaster General with the consent of the Treasury to make regulations for carrying out the provisions of the Act) as amended by the Government Annuities Act, 1882 (45 & 46 Vict c 51) s 6

(l) *Ibid* s 9

## SECT 2

## Extent of Powers of Management etc

Old age pensions

much of the grant as it thinks fit to the institution or person having the care of the pensioner, and may apply any surplus, or such part thereof as it thinks fit for or towards the maintenance and benefit of the wife or relatives of the pensioner (*m*)

Detention in an asylum within the meaning of the Lunacy Acts (*n*) will, while such detention lasts disqualify a person from receiving or continuing to receive a pension under the Old Age Pensions Act 1908 (*o*)

SUB SECT 3 — *Payment of Creditors*

Inquiry as to debts

Position of creditors

**912** The master may inquire as to any debts due from the lunatic (*p*) But unless the lunatic's funds are more than enough for his own purposes creditors stand little chance of recovering their debts During the lunacy they are without remedy they cannot obtain any payment unless the master makes an order in their favour and if they apply an order may be made or refused to all or any in the discretion of the master (*q*) Even when creditors have obtained a charging order on a fund in court in lunacy (*r*), or have issued a writ of *fi fa* (*s*) they are unable to enforce either remedy as against the court's power to dispose of funds in the custody of the Court in Lunacy for the lunatic's benefit during his life Where necessary for the due protection of the property in this sense the court will make an order for bringing it into court (*s*) Creditors however who have obtained judgment before a lunacy will not be deprived of their rights by the lunacy if execution has been levied before the lunacy jurisdiction has attached (*t*) nor will a creditor who has obtained a charging order on funds of the lunatic in the High Court and not yet brought under the control of the Lunacy Court even though the order was obtained after the lunacy (*a*)

Remedy as against fund in lunacy

In the case of funds in the custody of the Court in Lunacy charging orders in the interests of creditors are to be recommended since on the recovery or death of the lunatic they become operative on the estate as it then exists (*b*)

Effect of charging order on such funds

Such an order can, of course in no wise prejudice the power of the lunacy jurisdiction to have recourse at any time during the lunacy to the lunatic's property so charged for any purposes beneficial to the lunatic (*c*) A charging order can be obtained in respect of debts

(*m*) Police Act 1890 (33 & 54 Vict c 45) s 7 (4) As to police authorities, see *ibid* Sched III and title POLICE

(*n*) As to these Acts see note (*l*) p 412 *ante*

(*o*) 8 Edw 7 c 40 s 3 (1) (*c*) and see title POOR LAW

(*p*) Rules in Lunacy 1892 r 3

(*q*) *Re Seager Hunt Solicitors Laint Co and J B Orr & Co Ltd v Hunt* [1906] 2 Ch 295 *per* BUCKLEY J at p 299 see also *Re Pink* (1893) 23 Ch D 577 C A

(*r*) *Re Plenderleith (a Person of Unsound Mind not so Found by Inquisition)* [1893] 3 Ch 332 C A

(*s*) *Re Winkle* [1894] 2 Ch 519 C A

(*t*) *Re Clarke* [1898] 1 Ch 336 C A see *Davies v Thomas* [1900] 2 Ch 462 C A

(*a*) *Re Brown Llewellyn v Brown* [1900] 1 Ch 489

(*b*) *Re Leavesley (a Person of Unsound Mind Deceased)* [1891] 2 Ch. 1 C A see also title EXECUTION Vol XIV pp 104 105

(*c*) *Re Plenderleith (a Person of Unsound Mind not so Found by Inquisition)* *supra*, *Re Pink supra*.

SECT 2  
Extent of  
Powers of  
Manage-  
ment etc

incumbrances past or future maintenance (*d*) and the payment of costs and is obtainable in the case of lunatics not so found by summons and in the case of lunatics so found by the summons issued after inquisition. When a charging order is obtained under the Judgment Acts 1838 and 1840 (*e*), there is no power to make an order providing that the amount to be charged shall be determined by the masters in lunacy for the judgment creditor is entitled to an unconditional order (*f*).

**913** Advances for a lunatic's maintenance may have been made voluntarily as a gift and without any expectation of being repaid or by way of loan (*g*). In the former case repayment out of the lunatic's estate will be refused (*h*) but in the latter case an obligation will be implied on the part of the lunatic to repay all sums so lent for the purposes of purchasing necessaries for him though only six years arrears will be allowed (*i*). After the death of a lunatic payment for past maintenance can only be claimed from his representative as a debt (*k*).

Repayment of  
advances for  
lunatic's  
maintenance

**914** The court's discretionary powers of applying the lunatic's property for his benefit cannot be defeated by an adjudication in bankruptcy made without the consent of the judge in lunacy and it is doubtful whether an adjudication made without such consent is valid (*l*).

Adjudication  
in bank-  
ruptcy

A lunatic with reference to whom no proceedings have been taken in lunacy can apparently only commit an act of bankruptcy involving intention during a lucid interval (*m*). When a lunacy follows on a bankruptcy the bankruptcy of course remains effective and the trustee in bankruptcy can effectively claim in the lunacy for any asset belonging to the bankrupt lunatic that properly vests in him self (*n*). A lunatic may for all purposes of the Bankruptcy Acts 1883—1890 (*o*) act by his committee or *curator bonis* (*p*) but the latter has no *locus standi* to intervene in an English bankruptcy properly instituted by the committee (*q*).

Lunacy  
following  
bankruptcy

(*d*) Lunacy Act 1890 (53 & 54 Vict c 50) s 117

(*e*) 1 & 2 Vict c 110 3 & 4 Vict c 82

(*f*) *Horne v Pountney* (1889) 23 Q B D 261 As to the effect of the order see title EXECUTION Vol XIV p 107

(*g*) *Re Weaver* (1882) 21 Ch D 61 C A

(*h*) *Ibid*

(*i*) *Ibid* *Re Harris* (1880) 49 L J (CH) 527 C A *Re Neuberg's Estate* *Eqleton v Neuberg* (1887) 36 Ch D 417 Necessaries mean goods suitable to the condition in life of the lunatic and his actual requirements at the time see Sale of Goods Act 1893 (56 & 57 Vict c 71) s 2 *Re Rhinoceros v Rhodes* (1890) 44 Ch D 94 C A and p 398 ante

(*k*) *Re Marman's Trusts* (1818) 8 Ch D 256 C A

(*l*) *Re Farnham (a Lunatic)* [1895] 2 Ch 799 see further title BANKRUPTCY AND INSOLVENCY Vol II pp 10 11 37 47

(*m*) *Crispe v Perrot* (1744) Willes 467 per WILLES CJ at p 473 *Re Spence Ex parte Stamp Ex parte Jones* (1846) De G 345 and *Re R S A* [1901] 2 K B 32 C A

(*n*) *Re Hands (a Lunatic)* (1877) 7 Ch D 26 C A

(*o*) For which see title BANKRUPTCY AND INSOLVENCY Vol II pp 1 et seq

(*p*) Bankruptcy Act 1883 (46 & 47 Vict c 52) s 148 and see title BANKRUPTCY AND INSOLVENCY Vol II pp 10 et seq

(*q*) *Re Aytoun Ex parte Official Solicitor of the Supreme Court* (1904) 20 T L R 252

## SECT 3

**Power to raise Money**

Power to sell charge mortgage etc

Declaration of charge.

SECT 3—*Power to raise Money*

**915** A committee or *quasi* committee may be authorised to sell charge, mortgage, or otherwise deal with the lunatic's present or future property for (1) payment of the lunatic's debts or engagements (2) discharge of incumbrances on his property (r) (3) payment of past maintenance or money expended for his benefit, (4) expenses of future maintenance (s)

Where moneys are expended for the permanent improvement of the lunatic's property the order may declare such moneys with interest (t), to be a charge upon the improved or any other property of the lunatic, provided that no right of sale or foreclosure during the lunatic's lifetime is conferred thereby (u). The charge may be in favour of the person advancing the money or if the loan is made out of the lunatic's general estate, to some person as a trustee for him as part of his personal estate (v). An estate of which the lunatic is tenant for life cannot be charged with moneys expended on an estate of which he is tenant in tail (w).

SECT 4—*Partnership and Dissolution thereof*

Effect of lunacy part 1

**916** The lunacy of a partner does not of itself dissolve the partnership and until dissolution such partner is entitled to share the profits and is liable for the losses of the firm (x). But the

(r) See *Re Fox (a Lunatic)* (1886) 33 Ch D 37 O A where money to pay debts of an ancestor was raised by mortgage of land descended from him but no covenant for payment was entered into on behalf of the lunatic see as to such a covenant *Re Ray (a Person of Unsound Mind)* [1896] 1 Ch 468 472 O A. As to covenants in mortgages generally see title MORTGAGE.

(s) Lunacy Act 1890 (53 & 54 Vict c 5) s 117 (1). In the case of a charge or mortgage for future maintenance the amount raised may be made payable contingently or on the happening of some future event or in a gross sum or in annual or periodical sums and at such times and in such manner as may appear to the court expedient (*ibid* s 117 (2)). An application to raise a sum for future maintenance made rather in the interests of the lunatic's relations than in his own interest will be refused (*Re Pugh a Lunatic* (1803) 3 De G M & G 416). For form of mortgage of lunatic's freeholds see *Encyclopædia of Forms and Precedents* Vol VIII p 571.

(t) The interest must be kept down during the lunatic's lifetime out of the income of his general estate so far as the same is sufficient to bear it (Lunacy Act 1890 (53 & 54 Vict c 5) s 118 (2)).

(u) *Ibid* s 118 (1). The paramount consideration is the interest of the lunatic. But the court may also consider what is fair and right as between his real and personal estates the character and devolution of which should be interfered with as little as possible. Regard ought also to be had to the nature and extent of the estate and to the difficulty in drawing a clear line between ordinary repairs and permanent improvements (*Re Gist (a Person of Unsound Mind)* [1904] 1 Ch 398 O A. *A G v Aylesbury (Marquis)* (1887) 12 App Cas 672). As a general rule when an order is made authorising the expenditure of money in permanent improvements the order should at the same time direct whether the expenditure is or is not to be charged on the improved property or if not the order should be made expressly without prejudice to the question how as between the real and personal estates the expenditure is ultimately to be borne (*Re Gist (a Person of Unsound Mind)* *supra*) see also p 449 *post*.

(v) Lunacy Act, 1890 (53 & 54 Vict c 5) s 118 (3).

(w) *Re Vavasour (a Lunatic)* (1885) 29 Ch D 306 O A.

(x) *Sayer v Bennet* (1784) 1 Cox Eq Cas 107 *Wrexham v Hudleston* (1734)

1 Swan 614 *Kirby v Carr* (1838) 3 Y & O (EX) 184 *Jones v Noy* (1833)

2 My & K 126, *Sadler v Lee* (1843), 6 Beav 324 *Leaf v Coles* (1851) 1

confirmed lunacy of a partner is a ground for dissolution (*g*) and an injunction will be granted restraining a lunatic partner from interfering in the conduct of the partnership affairs (*a*). Further, the court will dissolve a partnership at the suit of the lunatic whether he has been so found by inquisition or not (*b*). The court will require to be satisfied that the lunacy existed at the time of the application and is probably incurable, evidence of past or temporary insanity will not suffice (*c*). The judge in lunacy may also, on a partner becoming a lunatic by order dissolve the partnership and the committee of such person as the judge approves on behalf of the lunatic may carry such order into effect (*d*).

Where articles of partnership provide for dissolution in certain events, the lunacy of one of the partners does not prevent the partnership being dissolved in accordance with the provisions of the articles (*e*) but where notice of dissolution has been served on a lunatic partner it is competent for the partner serving the notice to withdraw it (*f*).

#### SECT 4 Partnership and Dis- solution thereof

Effect of  
legal  
provisions for  
dissolution

#### SECT 5 — Powers Exercisable with Leave of the Judge

**917** The committee or *quasi* committee may by order be authorised to sell (*g*) any real or personal property whether in possession reversion remainder or expectancy of which a lunatic is seized or possessed and any estate or interest and any undivided share therein (*h*). Such a sale may be authorised in consideration of a perpetual rentcharge without any immediate cash payment (*i*) but not in consideration of the allotment of shares in a company (*k*). Where the lunatic is tenant for life of a fund over which he has a general power of appointment an order may be made for the sale of the fund without prejudice to any question which may arise if the lunatic shall appoint (*l*).

Power of sale

Consideration

Property  
subject to  
power

De G M & G 171 *Jones v Lloyd* (1874) 1 R 18 17q 265 *Drew v Nunn* (1879) 4 Q B D 661 As to the rights and duties of partners generally see title PARTNERSHIP

(*g*) *Rowlands v Evans Williams v Rowlands* (1861) 30 Beav 302 *Kirby v Carr* (1838) 3 Y & C (ex) 184

(*a*) *J v S* [1894] 3 Ch 72

(*b*) *Sidler v Lee* (1843) 6 Beav 324 *Jones v Lloyd supra* *Beall v Smith* (1873) 9 Ch App 60 92

(*c*) *Kirby v Carr supra* *Sidler v Lee supra* *Lea v Chamblain* (1800) 2 Ves Sen 33 *Wrenham v Hudleston* (1834) 1 Swan 314 *Whitwell v Arthur* (1860) 30 Beav 140

(*d*) Lunacy Act 1890 (53 & 54 Vict c 5) ss 119 124

(*e*) *Robertson v Lockie* (1846) 15 Sim 85 *Mellersh v Keen* (1859) 27 Beav 236

(*f*) *Jones v Lloyd supra*

(*g*) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (2) (as to committees)  
Lunacy Act 1908 (8 Edw 7 c 47) s 1 (as to *quasi* committees)

(*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 341 In *Re Weld a Lunatic* (1885) 28 Ch D 514 C A it was held that the court had no jurisdiction to authorise the sale of a lunatics undivided share of land to the owner of the other shares. But in view of the definition clause to the Lunacy Act 1890 (53 & 54 Vict c 5) s 341 such a sale can now be carried into effect. For forms of conveyance by committee or *quasi* committee see *Encyclopædia of Forms and Precedents* Vol XII pp 539—543 720

(*i*) *Re Ware (a Person of Unsound Mind)* [1892] 1 Ch 341 C A

(*k*) *Re A B* [1899] W N 233 C A

(*l*) *Re Hurst* (1892) 67 L T 702 C A As to the exercise of powers vested in the lunatic see p 455 *post*

## SECT 5

**Powers  
Exercisable  
with Leave  
of the Judge**Approval of  
contractPower of sale  
as tenant for  
life

On a sale by private treaty a conditional contract should be entered into and submitted to the master in lunacy for approval (*m*) and his leave must be obtained before offering any property for sale by public auction (*n*)

**918** Where a tenant for life of land is a lunatic, the powers of selling conferred by the Settled Land Acts (*o*) on tenants for life can be exercised, in the case of a lunatic so found by a committee of the estate pursuant to an order of the judge in lunacy (*p*), and, in the case of a lunatic not so found, by a *quasi* committee (*q*) with the authority of a master (*q*). The committee or *quasi* committee must obtain the leave of the court before giving the statutory notice (*r*) to the trustees of the settlement of his intention to sell (*s*), and where there are no trustees new trustees of the settlement for the purposes of the Settled Land Acts (*o*) must first be appointed (*t*). A sale of a lunatic tenant in tails undivided share to the owners of the other shares may be authorised (*a*). All applications whether the lunatic be so found or not, are by summons to the master in lunacy (*b*).

Land pur-  
chased under  
compulsory  
powers.

**919** Should a lunatic whether so found or not, be seised of premises to be compulsorily acquired in fee simple the sale can be carried into effect under an order of the master (*c*). In the case of a lunatic tenant for life the sale may be effected if he is a lunatic

(*m*) The application to confirm the conditional contract is made by summons (Rules in Lunacy 1892 r 19) supported by an affidavit of a valuer and by an affidavit as to the necessity or desirability of selling. The draft conveyance is settled and approved by the master.

(*n*) The application for leave to sell by public auction is made by summons (Rules in Lunacy 1892 r 19) an affidavit as to reserves from an auctioneer is required and the draft conditions of sale are approved by the master in lunacy.

(*o*) See title SETTLEMENTS

(*p*) Settled Land Act 1882 (45 & 46 Vict c 38) s 62. For a form of conveyance see *Encyclopædia of Forms and Precedents* Vol XII p 720.

(*q*) Lunacy Act 1908 (8 Edw 7 c 47) s 1. As to the law before that Act see *Re Baggs* (1893) [1894] 2 Ch 416 n C A and *Re S S B (a Person of Unsound Mind not so Found by Inquiry)* [1906] 1 Ch 113 C A and compare *Re X (a Person through Mental Infirmary incapable of managing his Affairs)* [1894] 2 Ch 415 C A.

(*r*) See Settled Land Act 1882 (45 & 46 Vict c 38) s 40 see title SETTLEMENTS

(*s*) *Re Ray v Settled Estates* (1884) 25 Ch D 464

(*t*) *Re Taylor* (1883) 52 T J (CH) 728 C A. The Lords Justices have repeatedly intimated that whether they have or have not power by virtue of their Chancery jurisdiction to appoint trustees under the Settled Land Act 1882 (45 & 46 Vict c 38) s 38 is quite immaterial since in their view such an order ought only to be made in the Chancery Division see the Settled Land Act 1882 (45 & 46 Vict c 38) ss 1(10) (ix) 46(1) and compare *Re Barber* (1888) 39 Ch D 181 C A and *Re Armfield* (1889) 88 L T Jo 97 C A. Under these circumstances the applicant should ask in his summons in lunacy that he may be at liberty in the name and on behalf of the lunatic to apply in the Chancery Division for the appointment of the proposed new trustees. See also title SETTLEMENTS TRUSTS AND TRUSTEES

(*a*) *Re Gustkell (a Lunatic)* (1889) 40 Ch D 416 C A

(*b*) Rules in Lunacy 1832 r 20

(*c*) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (*a*) Lunacy Act 1908 (8 Edw 7, c 47) s 1 see p 441 *ante*

so found by his committee (*d*) with the leave of the judge in lunacy (*e*), and if he is a lunatic not so found by a *quasi* committee (*f*) pursuant to an order of the master (*g*). The order for payment into court (which should be made both in lunacy and in Ghancery) ought to provide for payment of the purchase money to the credit of the lunacy direct to the joint account of the lunatic and the purchaser (*h*). If the money is directed to be invested at once in an investment equivalent to the purchase of land the name of the purchaser may be omitted from the title of the account (*i*).

SECT 5  
Powers  
Exercisable  
with Leave  
of the Judge

When lands compulsorily taken are subject to a rentcharge in favour of a lunatic during his life the court may authorise the committee or *quasi* committee to release the lands from the rent charge upon the purchasers buying in the name of the lunatic, a Government annuity of the same yearly value for his life (*k*).

Subject to a  
rentcharge

**920** A committee or *quasi* committee may be authorised by the master to make exchange of or partition any property belonging to the lunatic or in which the latter is interested and to give or receive any money for equality of exchange or partition (*l*) either with or without minerals (*m*). Any property taken in exchange is held to the same uses and subject to the same trusts incumbrances and conditions as the property given in exchange (*n*). The power of a tenant for life to exchange or concur in a partition of settled land (*o*) may be exercised by the committee or *quasi* committee of a lunatic tenant for life with the leave of the judge in lunacy (*p*).

Power of  
exchange or  
partition

**921** A committee or *quasi* committee may be authorised to carry on any trade or business of the lunatic (*q*). But before sanctioning such a course the master will require to be satisfied by the clearest evidence not only that the business has been conducted hitherto at a profit but also that it may continue by proper management to be profitably and advantageously worked in the future (*r*).

Power to  
carry on  
business

(*d*) Lands Clauses Consolidation Act 1845 (5 & 9 Vict c 18) s 7

(*e*) *Re Taylor* (1849) 1 H & Lw 432 (obtained from a master on summons) Lunacy Act 1891 (54 & 55 Vict c 65) s 21. Rules in Lunacy 1892 r 20

(*f*) Lunacy Act 1908 (8 Fdw 7 c 47) s 1

(*g*) *Ibid* modifying the law as stated in title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI p 101 note (*d*) and compare *Le Tuquell* (1884) 27 Ch D 309

(*h*) *Re Milnes (a Person of Unsound Mind)* (1910) 1 Ch D 28 C A. As to the payment of dividends from investments to committees see *Re Ryder (a Person of Unsound Mind)* (1881) 37 Ch D 590 C A.

(*i*) *Re Buckingham* (1816) 2 Ch D 690 C A

(*j*) *Re Br uer* (1810) 1 Ch D 409 C A. See further as to purchase from lunatics and persons under disability title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 57 58 61 109 110

(*k*) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (b) Lunacy Act 1908 (8 Fdw 7 c 47) s 1. As to partition see title PARTITION

(*l*) *Re Duconson (a Lunatic)* (1880) 10 Ch D 316 C A

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 121

(*o*) Settled Land Act 1892 (45 & 46 Vict c 38) s 3 (iii) (iv) see titles PARTITION SETTLEMENTS

(*p*) Settled Land Act 1882 (45 & 46 Vict c 38) s 62 Lunacy Act 1908 (8 Fdw 7 c 47) s 1

(*q*) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (c) Lunacy Act 1908 (8 Fdw 7 c 47) s 1

(*r*) *Elmer Practice in Lunacy* 7th ed., 96



## SECT 5

Powers  
Exercisable  
with Leave  
of the Judge

The effect of an order authorising a committee or *quasi* committee to carry on a lunatic's business is to make him the agent of the lunatic for the purpose of carrying on his business, accordingly, in the absence of evidence that he intended to pledge his personal credit, or that the goods were supplied to his personal credit he is not liable on trade contracts (s)

Powers of  
leasing

**922** A committee or *quasi* committee may be authorised by order of the master in lunacy —

(1) To grant leases of any property of the lunatic for building, agricultural or other purposes (t) not including however, a lease of an easement (a)

(2) To grant leases of minerals forming part of the lunatic's property whether the same have been already worked or not, and either with or without the surface or other land (b)

(3) To accept a surrender of any lease and grant a new lease (c),

(4) To execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends (d)

Extent of  
power

The power to authorise leases extends to property of which the lunatic is tenant in tail and a lease properly granted pursuant to an order of the master binds the lunatic's issue and all persons entitled in remainder and reversion expectant upon the estate tail of the lunatic including the Crown and upon the death of the lunatic the remaindermen have the same rights and remedies against the lessee as the lunatic or his committee would have had (c). Leases may be granted or accepted for such number of lives or such term of years (f) at such rent or royalties and subject to such reservations covenants, and conditions as the master may approve (g) and fines or other payments on the renewal of leases may be paid out of the lunatic's estate or charged with interest on the leasehold property (h)

(a) *Isaacs v Chinery* (1896) 74 L T 320 *Plumpton v Burkenshaw* [1908] 2 K B 512 C A See also *Burt Boulton and Hayward v Bull* [1895] 1 Q B 216 C A *Owen & Co v Cronk* [1891] 1 Q B 265 C A

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (d) Lunacy Act 1908 (8 Edw 7 c 47) s 1 For a form see *Encyclopædia of Forms and Precedents* Vol VII p 652 As to the law of landlord and tenant generally see title LANDLORD AND TENANT Vol XVIII pp 331 *et seq*

(a) *Re Arnott* (1891) 35 Sol Jo 623 C A

(b) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (e) Lunacy Act, 1908 (8 Edw 7 c 47) s 1 *Ex parte Labbatt* (1801) 6 Ves 428 As to mining leases generally see title MINES MINERALS AND QUARRIES

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (g) Lunacy Act 1908 (8 Edw 7 c 47) s 1

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (h) Lunacy Act 1908 (8 Edw 7 c 47) s 1 see *Re Salt* [1896] 1 Ch 117 C A The powers of leasing given by the Settled Land Acts (see title SETTLEMENTS) are exercisable by the committee or *quasi* committee of a lunatic tenant for life with the sanction of the master in lunacy (Settled Land Act 1882 (45 & 46 Vict c 38) s 62 Lunacy Act, 1908 (8 Edw 7 c 47) s 1) For a form of lease, see *Encyclopædia of Forms and Precedents* Vol VII p 653

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 122 (1)

(f) Thus a lease has been authorised for twenty one years if the lunatic shall so long live determinable on his death (*Re White* (1852) 1 W R 294, C A)

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 122 (2)

(h) *Ibid* s 122 (3) As to royalties fines premiums and other payments, and how the same are to be ultimately borne see p 450 *post*

When convenient, and to prevent hardship to a tenant, the master may adopt and carry into effect an arrangement entered into without his sanction (i). The master will when expedient exercise the discretion of a landlord in giving preference to an old tenant and in not being governed entirely by the highest offer (k) and relief against forfeiture on breach of a covenant to repair may be granted to a tenant (l). Should the committee or *quasi* committee grant a lease at an undervalue and on his own responsibility he will be liable for any loss to the estate (m). If the sanction of the master to the renewal of a lease (n) or to a reduction of rent (o) is required, the application must be made by the committee or *quasi* committee and not by the tenant who has no *locus standi* in the lunacy and could only be heard as a matter of grace after the refusal of the committee or *quasi* committee to move in the matter. The practice in the Lunacy Office (p) is for the committee or *quasi* committee to enter into a conditional contract with the proposed tenant or lessee and then to apply by summons on proper evidence of value, that such contract may be confirmed and carried into effect (q).

SECT 5  
Powers  
Exercisable  
with Leave  
of the Judge

Arrangements  
as to leases  
Leases at  
undervalue

The committee or *quasi* committee may also be authorised to surrender any lease and accept a new lease (r) which will be held subject to the same uses trusts incumbrances, and conditions as the surrendered lease (s). When a lease is renewed for the benefit of the lunatic's estate, the tenant should be either the lunatic or else the committee or *quasi* committee, according as the old lease was granted to the lunatic himself or to someone in trust for him (t).

Surrender of  
leases

The committee or *quasi* committee cannot maintain an action for rent accrued due after the lunatic's death though reserved by the lease granted by himself on behalf of the lunatic wherein the lessee covenanted with him as committee or *quasi* committee for payment thereof (u).

Recovery of  
rent after  
lunatic's  
death

**923** A committee or *quasi* committee may be authorised to perform any contract relating to the property of the lunatic

Contracts  
made before  
lunacy

(i) *Re Wynne* (1872) 1 Ch App 229 see *Lister v Marchant* (1684) 1 Vern 262

(j) *Re Ball a Lunatic* (1828) 1 Mol 141

(k) *Re Ldridge Ex parte Vaughan* (1833) Turn & R 434

(m) *Re Wilkins a Lunatic Ex parte Wilkins and Ex parte Jenney* (1842) 6 Jur 306

(n) *Re Hilkenny (Earl) a Lunatic* (1845) 7 I Eq R 594

(o) *Re Fitch* (1830) 1 Russ & M 354

(p) As to the Lunacy Office see pp 412 413 *ante*

(q) Rules in Lunacy 1892 r 19 As to order authorising lease and allowance of such lease when settled see Rules in Lunacy 1893 r 10 A committee should execute a lease as follows — A B (the Lunatic) by C D (Committee of his Estate). But if he executes in his own name alone such execution is good provided it is apparent from the lease that he was acting as committee (*Laurie v Lees* (1881) 7 App Cas 19). A *quasi* committee should execute thus — A B by C D.

(r) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (f) Lunacy Act 1908 (8 Edw 7 c 47) s 1

(s) Lunacy Act 1890 (53 & 54 Vict c 5) s 121

(t) *Ex parte Jermyn* (1788) 3 Swan 131, n

(u) *Foot v Leake* (1885) 16 L R Ir 411

**SECT 5**  
**Powers**  
**Exercisable**  
**with Leave**  
**of the Judge**

entered into by the lunatic before his lunacy (a) and the master may make such inquiries as he thinks fit respecting any dealings with the lunatic's estate and the application thereof prior to the proceedings in lunacy and respecting the state and condition of the lunatic at the time of such dealings (b). Thus transactions under a power of attorney granted by the lunatic may be inquired into and a committee who has before inquisition managed for some time and made large profits out of his lunatic's estate may be ordered to pay interest on the savings (c).

**Power to**  
**dispose of**  
**onerous**  
**property**

**924** A committee or *quasi* committee may be authorised to surrender, assign or otherwise dispose of, with or without consideration, any onerous property belonging to the lunatic (d). In exercising his discretion, the master will act for the lunatic as if he were a person of sound mind and guided by reasonable motives (e).

**Power to enter**  
**into patronage**  
**agreements**

**925** A committee or *quasi* committee may be authorised by the master in lunacy on summons (f) to enter into any agreement touching the patronage of augmented cures under Queen Anne's Bounty Act 1714 (g), which the lunatic might have entered into if he had been of sound mind (h).

**Power to**  
**consent to the**  
**exercise of**  
**any beneficial**  
**power**

**926** A committee or *quasi* committee may be authorised to exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic (i). This jurisdiction is not confined to the cases enumerated in the Lunacy Act 1890 (j) and the specific provisions in Part IV thereof are enabling and not restrictive clauses (k). Thus the jurisdiction extends to the following powers: that is to say power to elect (l), power to accept a devise containing an onerous condition (m), power to consent to the exercise of a power of advancement under a marriage settlement (n), power to revoke a voluntary settlement (o), power to bail the estate

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (1). Lunacy Act 1908 (8 Edw 7, c 47) s 1. As to applications see Rules in Lunacy 1892 r 19. See further as to a lunatic's contract pp 396 *et seq ante*.

(b) Rules in Lunacy 1892 r 34.

(c) *Ex parte Chumley* (1791) 1 Ves 156.

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 120 (j). Lunacy Act 1908 (8 Edw 7, c 47) s 1. As to applications see Rules in Lunacy 1892 r 19.

(e) *Re Sefton (Earl) (a Person of Unsound Mind)* [1898] 2 Ch 378 C.A.

(f) Rules in Lunacy 1892 r 19.

(g) 1 Geo 1 stat 2 c 10. See title ECCLESIASTICAL LAW Vol XI p 566.

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 10 (k). Lunacy Act 1908 (8 Edw 7, c 47) s 1. As to applications see Rules in Lunacy 1892 r 19.

(i) Lunacy Act, 1890 (53 & 54 Vict c 5) s 10 (l). Lunacy Act 1908 (8 Edw 7, c 47) s 1. As to applications see Rules in Lunacy 1892 r 19.

(j) 53 & 54 Vict c 5.

(k) *Re Sefton (Earl) (a Person of Unsound Mind)* *supra*. See the Lunacy Act 1890 (53 & 54 Vict c 5) ss 120 124.

(l) *Wilder v Pigott* (1882) 22 Ch D 263.

(m) *Re Sefton (Earl) (a Person of Unsound Mind)* *supra*.

(n) *Re Nevill a Lunatic* (1880) 1 Ch D 161.

(o) *Re Price* (1909) C.A. unreported.

tail of a lunatic tenant in tail provided that the devolution of the proceeds of sale is not affected and that the rights of the remaindermen are not prejudiced (*p*), power to exercise the power of sale contained in a mortgage (*q*) or in a settlement (*r*). But the lunatic's interest must be a beneficial one and the Lunacy Act 1890 (*s*) s 120 does not enable the exercise of a power vested in the lunatic as a trustee (*t*) nor does it enable the grant of an easement (*u*). The Lords Justices sitting in lunacy have jurisdiction to order the costs of an unsuccessful opposition to a Bill in Parliament affecting the estate of a lunatic tenant for life of settled land to be paid out of the *corpus* of the property subject to the settlement (*a*)

SECT 5  
Powers  
Exercisable  
with Leave  
of the Judge

#### SECT 6 — *Conversion*

**927** In dealing with the property of a lunatic the leading principle and paramount consideration is the interest of the lunatic as exemplified by the maintenance of himself and his family or expediency in the management of his property (*b*). The court will therefore apply the lunatic's estate and if necessary change the condition of the property for these two paramount objects without regard to the interests of the lunatic's successors or any expectancies they may have in his estate (*c*). Apart from special circumstances there is no equity between the real and personal representatives of a lunatic (*d*).

Purposes for  
which power  
conversion  
generally  
exercised

**928** Subject to the satisfaction of the above mentioned paramount claims the lunatic, his representatives devisees legatees or assigns have the same interest in any moneys not so applied arising from the sale mortgage or other disposition of the lunatic's property under the judge's order as he or they would respectively have had in the property itself if no such sale mortgage or other disposition had been made and further the surplus moneys themselves are of the same nature as the property from which they are derived (*e*). A sale of the lunatic's property by a mortgagee under

No conversion  
as to property  
not applied

Excep-  
tion to  
rule

(*p*) *Re Pares Tillingston v Pares* (1879) 12 Ch D 335 C A see *Pe Sarrin* (*a Person of Unsound Mind*) (1882) 20 Ch D 370 C A *Re Sifton (Earl)* (*a Person of Unsound Mind*) [1898] 2 Ch 378 C A

(*q*) *Re Hurwood (a Person of Unsound Mind)* (1887) 35 Ch D 470 C A is not now followed it being the practice of the master in lunacy to direct the committee to convey pursuant to the Lunacy Act 1890 (s 3 & 54 Vict c 5) ss 1-10 1-4

(*r*) *Re X (a Person through Mental Infirmary incapable of managing his Affairs)* [1894] 2 Ch 415 C A

(*s*) 53 & 54 Vict c 5

(*t*) *Re Shortridge (a Person of Unsound Mind)* [1895] 1 Ch 278 C A As to the exercise of a power vested in the lunatic as a trustee see pp 455 *et seq* post

(*u*) *Re Arnott* (1891) 35 Sol Jo 673 C A

(*a*) *Re Blake (a Lunatic)* (1890) 21 T T 280 C A

(*b*) Lunacy Act 1890 (s 3 & 54 Vict c 5) s 116 (4) and see p 437 ante

(*c*) *A G v Ailesbury (Marquis)* (1887) 12 App Cas 61 per Lord MACNAGHTEN at p 688

(*d*) *Oxenden v Compton (Lord)* (1793) 2 Ves 69 *Re Hole Davies v Wills* [1906] 1 Ch 673 682 C A see *Hartley v Penlarves* [1901] 2 Ch 498 *Re Grange Chadwick v Grange* [1907] 2 Ch 20 C A

(*e*) Lunacy Act 1890 (s 3 & 54 Vict c 5) s 123 (1) see *Re Matson Jam v Dickinson* [1897] 2 Ch 509 Before the Lunacy Act 1890 (s 3 & 54 Vict c 5) a sale of stock was held to adeem a bequest (*Jones v Green* (1865) L R 5 Eq 555 *Re Freer Freer v Freer* (1862) 22 Ch D 622). As to redemption generally see titles EQUITY Vol XIII pp 130 *et seq* WILLS

# SECT 6 Conversion

Moneys  
accumulated  
estate

his power of sale does however effect conversion as regards surplus proceeds (f) while on a sale in a partition action there is an equity for reconversion (g)

**929** As between the representatives of the lunatic's real and personal estates and subject to the above mentioned paramount claims, the following moneys when derived from the lunatic's real estate, are considered as real estate —(1) Moneys received for equality of partition and exchange or under any lease of unopened mines (2) fines premiums and sums of money received on the grant or renewal of a lease

Moneys  
derived  
from real  
property

**930** On the other hand all fines premiums and sums of money received from the grant or renewals of leases of property of which the lunatic was tenant for life are considered as personal property (h) except for the paramount objects above mentioned

No conversion  
unless for  
special  
reasons

**931** Although it is within the power of the Court in Lunacy to change the nature of a lunatic's estate it is contrary to the general principle and course of administration to do so unless it is considered for special reasons to be for his benefit (i) So the court will not invest his personal estate in the purchase of land (j) with out by its order impressing upon the property purchased the character of personal estate (l) Conversion will however be deemed to have taken place when a contract to purchase land entered into by a lunatic while of unsound mind but before he was proved lunatic is completed by the committee with the sanction of the court (m)

Release of  
charge on  
realty

**932** When a charge on a lunatic's real estate is paid off out of his personal estate the payment will be made without prejudice to the question how the debt should ultimately be borne (n) Such a debt will be borne by the real estate (o) unless the money so applied arises by the accumulation of surplus rents or the sale of timber (p)

(f) *1 Charge Chalmers v Crange* [1901] 2 Ch 70 (CA) (where the trust of the surplus proceeds was for the mortgagee his heirs and assigns)

(g) *1 Earl* (1881) 1 Ch D 241 (CA) See title PARTITION

(h) Lunacy Act 1890 (33 & 34 Vict c 5) s 13 (2)

(i) *1 G v Ailesbury (Marquis)* (188) 12 App Cas 61 per Lord STIRNOR at p 65 see also *per Lord Macnaghten* at p 688 compare *1 Ex parte Inland Revenue (Mortuaries)* (1849) 1 Amb 80 81

(j) *1 Jarlett v Turner* (1812) 4 Bro CC 235 n *Oscenden v Compton* (Lord) (189) 1 Ves 69 73

(k) See *1 G v Ailesbury (Marquis)* *supra* *1 Ex parte Degge* (1764) 4 Bro CC 235 n compare *1 Ex Badcock a Lunatic* (1840) 4 My & Cr 440 There may be some doubt as to what result would follow if such a direction were omitted see *Oscenden v Compton* (Lord) *supra*

(m) *1 Alden v Smith* [1900] 1 Ch 588

(n) *1 Le Leeming a Lunatic* (1861) 3 De G 1 & J 43 (CA) see *1 Ex Mellis* (1883) 3 T J (CR) 248 (CA)

(o) *1 Ex Norfolk (Dowager Duchess)* *Ex parte Digby* (Earl) (1821) Jac 235 *1 Ex parte Hinde* (1822) Amb 106 n *Well v Jew* (1829) Beat 268 *1 Ex Leeming a Lunatic* *supra* see *1 G v Ailesbury (Marquis)* *supra* at p 690

(p) *1 Ex parte Hill* (1812) 19 Ves 116 *1 Ex parte Grimstone* (1772) Amb 706 *Newcombe v Newcombe* (1841) 3 Ir Eq R 414 *Leitrim* (Lord) v *Leitrim* (1844) 6 Ir Eq R 33 see *1 Ex Hole Davies v Watts* [1906] 1 Ch 673 (CA) (Some of these cases however seem to have been decided on principles not depending on the origin of the money applied)

When a lunatic becomes entitled to a charge on real estate belonging to him the charge will as a rule merge (*q*)

SECT 6  
Conversion

**933** Acts done in the ordinary course of managing a lunatic's estate will effect conversion (*r*) So where timber is cut and sold the proceeds will pass as personality (*s*) and money expended on repairs and even on some improvements will sink into the real estate (*t*) though the cost of permanent improvements will generally be charged on the real for the benefit of the personal estate (*u*) But a mere transfer into court of stock will not adeem a bequest of such stock standing in the name of the lunatic (*b*) The court will not do anything if it can help it which will affect a disposition under a lunatic's will (*v*)

Acts in ordinary course of management

#### SECT 7 — Copyholds

**934** The capacity of a lunatic to be a tenant of a manor and the law relating to a lunatic interested in the enfranchisement, redemption and sale of copyholds are dealt with elsewhere (*d*)

General law

**935** Where a lunatic so found is entitled to be admitted to copyholds his committee may offer to be himself admitted and in default of his appearance or acceptance of admittance the lord or his steward may by attorney admit the lunatic (*e*)

Admittance by committee or attorney

The customary fine will be payable (*f*) and if it is not paid within three months after demand the lord may enter upon and hold the land until the fine and the costs are paid (*g*) but the lord must yearly render an account of the rents and profits received and pay the surplus, if any, to the person entitled thereto (*h*) As soon as the fine and costs have been paid or lawfully tendered the lord must deliver up possession under penalty of damages (*i*) If the committee pays the fine and costs, he may enter on and hold

Fines payable

(*q*) *Compton (Lord) v Orenden* (1893) 2 Ves 261 *See Hile Davies v Wills* [1906] 1 Ch 613 682 (A)

(*r*) *See A G v Aylesbury (Marquis)* (1581) 12 App Cas 61, 658

(*s*) *Orenden v Compton (Lord)* (1893) 2 Ves 69 *Hirley v Denham* [1901] 2 Ch 498

(*t*) *Re Badcock a Lunatic* (1840) 4 My & Cr 410 *See Cust (a Person of Unsound Mind)* (1871) 5 Ch D 551 (CA) *See Cust (a Person of Unsound Mind)* [1901] 1 Ch 398 (CA)

(*u*) *Re Badcock a Lunatic supra* *See Cust (a Person of Unsound Mind)* [1901] 1 Ch 398 (CA) Lunacy Act 1890 (33 & 34 Vict c 5) s 115 *see note (u)* p 442 ante

(*b*) *Re Wood Anderson v London City Mission* [1891] 2 Ch 517

(*c*) *Re Wood Anderson v London City Mission supra* (where costs were directed to be paid out of stock not specifically bequeathed) *Re Melly* (1853) 3 L J (Ch) 248 (CA)

(*d*) *See title COPYHOLDS Vol VIII pp 49 66 83 101 113 116* As a general rule a quasi-committee in lunacy will if authorised by the master in lunacy be clothed with sufficient authority without further application to the Board of Agriculture *see ibid* p 116

(*e*) *See title COPYHOLDS Vol VIII p 104* Here again a quasi-committee under the Lunacy Act 1890 (33 & 34 Vict c 5) s 116 has been authorised to be admitted (*Re Andrews* (1904) Registrars Library Lunacy Office)

(*f*) Lunacy Act 1890 (33 & 34 Vict c 5) s 126 (1)

(*g*) *Ibid* s 126 (2)

(*h*) *Ibid* s 126 (3)

(*i*) *Ibid*, s 126 (4)

SECT 7  
Copyholds

the land and receive the rents and profits until repayment, although the lunatic die before reimbursement (*k*) A lunatic is not debarred from himself controverting the legality of the fine, nor can any lunatic so found incur a forfeiture of any land for neglecting or refusing to appear at any court or to be admitted or to pay the fine on admittance (*l*)

Lord of a  
manor a  
lunatic

**936** Where the estate of a lunatic includes a manor the lunacy of the lord does not invalidate a grant by him of copyholds warranted by the custom (*m*)

SECT 8—*Stock*

Order for  
transfer

**937** Where any stock (*n*) is standing in the name of or vested in a lunatic beneficially, or in a committee of the estate of a lunatic in trust for him and the committee dies intestate or himself becomes lunatic or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead or he neglects or refuses to transfer the stock and to receive and pay over the dividends as the judge in lunacy directs then the judge (*o*) may order some person to transfer (*p*) the stock into court (*q*) or into the name of a new committee or otherwise and also to receive and pay over the dividends in such manner as the judge directs (*r*)

(*l*) Lunacy Act 1890 (53 & 54 Vict c 5) s 126 (5)

(*h*) *Ibid* s 126 (6)

(*m*) 1 Watkins Treatise on Copyholds 4th ed 24 30 255 title COPYHOLDS, Vol VIII p 83 see also Pope Law and Practice of Lunacy 2nd ed 174

(*n*) Stock as defined by the Lunacy Act 1890 (53 & 54 Vict c 5) s 341 includes any fund annuity or security transferable in books kept by any company or society or by instrument of transfer alone or by instrument of transfer accompanied by other formalities and any share or interest therein and also shares in ships registered under the Merchant Shipping Act 1854 (17 & 18 Vict c 104)

(*o*) The master in lunacy has jurisdiction to make orders under this provision whether the lunatic is or is not so found by inquisition or is a person with reference to whom an order has been made under the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (d) (*Re Browne* [1894] 3 Ch 412 C A see *the fuller details of Unsound Mind, not so found*) [1900] 2 Ch 551 C A) A county court judge has no jurisdiction to make a vesting order of stock standing in the name of a lunatic (*Re Noyce* [1892] 1 Q B 642 C A) Orders made under this provision must be entitled In the matter of the Lunacy Acts 1890—1908 as well as in the particular lunacy except cases under the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (d) (*Re Furvis (a Person of Unsound Mind)* [1904] 1 Ch 373 C A)

(*p*) The person to transfer must be some proper officer of the bank or company or society whose stock is to be transferred (Lunacy Act 1890 (53 & 54 Vict c 5) s 137)

(*q*) The usual practice in lunacy is to transfer the stock into court unless sufficient reason exist for not doing so (*Re Browne supra per LINDLEY, L J* at p 417 *Re Auchmuty* (1908) 99 L T 462 C A)

(*r*) Lunacy Act 1890 (53 & 54 Vict c 5) s 33 An order directing lodgment in court of securities but payment of accrued dividends to date of lodgment direct to the committee or quasi committee is valid and may safely be acted upon by the bank or other company in whose possession the accrued dividends may be (*Re Surling* [1909] 1 Ch 199 C A see also *Re Sherwell Lunacy Order* (1904), 29th April) Although there is also power to order

SMOT 8

Stock

Transfer of  
stock of  
lunatic  
residing out of  
the juris-  
diction.

**938** Where any stock is standing in the name of or is vested in a person residing out of the jurisdiction of the High Court, the judge in lunacy, upon proof to his satisfaction that the person has been declared lunatic and that his personal estate has been vested in a person appointed for the management thereof according to the law of the place where he is residing may under the Lunacy Act, 1890 (s) s 134, order some fit person to transfer the stock to the person so appointed or otherwise, and also to receive and pay over the dividends thereof (a)

Before such an order can be made a foreign judicial declaration of lunacy must be made and the status of the patient altered (b) To ascertain whether a foreign judicial declaration of lunacy has been made the court will look to the substance rather than to the form (c) The above mentioned section also requires that the personal estate of the lunatic shall have been vested in a person appointed for the management thereof This is not confined to vesting in the strict sense but includes the right to obtain and deal with such estate without being the actual owner (d) The judge in lunacy has an absolute discretion under this provision (e) and the court refuses to lay down rules governing the exercise of such discretion (f)

Before the court will order the capital to be transferred to the foreign curator it must as a rule be shown that it is wanted for the maintenance of the lunatic (g) Where it is not required for maintenance then unless special circumstances can be shown, the dividends only will be paid (h)

Capital must  
be required  
for main-  
tenance.

This provision is not applicable to a fund representing the proceeds of sale of real estate the title to which is regulated by English law The income of the property may however be paid (i)

In the absence of a foreign judicial declaration of lunacy the

payment of future dividends by the bank to the committee or *quasi* committee without lodging the *corpus* in court the more usual and proper practice is to order the stocks themselves to be transferred into court into the name of the Paymaster General and to direct him to pay the future dividends to the committee or *quasi* committee (*Re Auchmuty* (1908) 99 L T 462 (C A) As to the effect of such orders as indemnities see note (m) p 456 *post*

(a) 53 & 54 Vict c 5

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 134 The orders under this provision are made by the Lords Justices upon minutes of order submitted by the master

(b) *Didshaw v London and Westminster Bank*, [1900] 2 Ch 15 C A

(c) *Re Tarratt* (1884) 51 L T 310 C A

(d) *Re Brown (a Lunatic)* [1890] 2 Ch 666 C A

(e) *Re Barlow & Wall* (1887) 36 Ch D 287 C A *Re Knight (a Lunatic)* [1898] 1 Ch 257 C A. *New York Security and Trust Co v Keyser* [1901] 1 Ch 666

(f) *Re De Larragosi (a Person of Unsound Mind)* [1907] 2 Ch 14 C A *per* COZENS HARDY M R at p 19

(g) *Re Brown (a Lunatic)* *supra* *Re Knight (a Lunatic)* *supra* *Re De Larragosi (a Person of Unsound Mind)* *supra*

(h) *Re Starb (a Lunatic)* (1850) 2 Mac & G 174 *Re Elias a Lunatic* (1851) 3 Mac & G 234 *Re Garner* (1872) L R 13 Eq 532 *Re Mitchell (a Lunatic Deceased in Scotland)* (1881) 17 Ch D 515 C A *New York Security and Trust Co v Keyser* *supra*

(i) *Greenwood v Bartels* (1877), 46 L J (CH) 788.



SECT 8

Stock

Jurisdiction  
of Chancery  
Division

Chancery Division has jurisdiction to order a transfer, and will do so in a proper case where no application is in fact made in lunacy (*k*). The foreign curator may apply in his own name without joining the lunatic (*l*)

SECT 9—*Mortgages*

Vesting order

**939** When a lunatic is solely or jointly (*m*) seised or possessed (*n*) of any land (*o*) or solely or jointly entitled to a contingent right in any land by way of mortgage the judge in lunacy may by order vest such land in such person for such estate and in such manner or release such hereditaments from the contingent right and dispose of the same to such person as he may direct. In all such cases the judge in lunacy may if it is more convenient appoint a person to convey the land or release the contingent right (*p*). When the lunatic is beneficially entitled the master in lunacy has jurisdiction not only to make an order for payment off of the mortgage money but also to appoint a person in place of the lunatic to reconvey (*q*). A transfer of the mortgage may be effectuated under the above provision (*r*).

Appointment  
of person to  
conveyTitle of  
application  
Applicant

The application should be intitled in the matter of the mortgage and of the particular lunacy and of the Lunacy Acts 1890—1908 (*s*). The applicant should be the lunatic acting by his committee or *quasi* committee and the mortgagor should not be served and even if served he is not entitled to costs out of the lunatic's estate (*t*). If the mortgagor makes the application where the committee or *quasi* committee has not declined to do so he may have to pay the costs (*u*).

Where service  
on other  
parties  
required.

Where on an application for a reconveyance there has been an assignment of the equity of redemption the court requires the

(*k*) *Didshaw v London and Westminster Bank* [1900] 2 Ch 15 C A

(*l*) *Thiery v Chalmers Guthrie & Co* [1900] 1 Ch 80

(*m*) The word seised in the Lunacy Act 1890 (53 & 54 Vict c 5) includes any vested estate for life or of a greater description and extends to estates at law and in equity in possession or in futurity in any lands (Lunacy Act 1891 (54 & 55 Vict 65) s 2b)

(*n*) The word possessed includes any vested estate less than a life estate at law or in equity in possession or in expectancy in any lands (*u/d*)

(*o*) The word land includes an undivided share of land (Lunacy Act 1890 (53 & 54 Vict c 5) s 41)

(*p*) Lunacy Act 1890 (53 & 54 Vict c 5) s 135 (1) (2) (4). By the Lunacy Act 1908 (8 Edw 7 c 41) s 2 it is provided that an order under the Lunacy Act 1890 (53 & 54 Vict c 5) s 135 (1) (2) shall have the same effect as if the lunatic had been sane and if solely seised possessed or entitled as aforesaid had executed or if jointly seised possessed or entitled as aforesaid with any other person or persons he and such other person or persons had executed a deed conveying the land for the estate named in the order or releasing or disposing of the contingent right. The application for a reconveyance or transfer should be by summons and may be made by any person beneficially interested in the equity of redemption or in the mortgage money whether under disability or not (Rule in Lunacy 1900 (b) Rules in Lunacy 1892 r 57 (b)).

(*q*) *Re Carnaby Gray* (1900) 26th July per COLLINS L J Registrars Library Lunacy Office. For a form see Encyclopedia of Forms and Pleadings Vol XVI p 433

(*r*) *Re Nicholson (a Person of Unsound Mind)* (1881) 34 Ch D 663 C A

(*s*) Rules in Lunacy 1892 r 58

(*t*) *Re Phillips* (1869) 4 Ch App 629

(*u*) *Re Wheeler a Person of Unsound Mind* (1852) 1 De G M & G 434 see *Re Sparks (a Person of Unsound Mind)* (1877) 6 Ch D 361 C A

original mortgagor to be served or the assignment strictly proved Copyhold land vested under this provision with the consent of the lord of the manor vests without surrender or admittance (a)

SECT 9  
Mortgages  
Copyholds.

The above provisions do not affect the jurisdiction of the High Court as to any lunatic mortgagee who is an infant (b)

## SECT 10—Power Vested in Lunatic as Trustee or Guardian

940 Where a power is vested in a lunatic in the character of trustee or guardian or the consent of the lunatic to the exercise of a power is necessary in the like character or as a check upon the undue exercise of the power and it appears to be expedient that the power should be exercised or the consent given the committee of the estate may under an order of the judge in the name and on behalf of the lunatic upon the application of any person interested exercise such power or give such consent in such manner as the order directs (c) Under the above provision a committee or quasi committee may exercise any power vested in the lunatic in a fiduciary capacity although he is not in fact a trustee (d) such as a joint power of appointment in a marriage settlement in favour of children (e) or a consent to the exercise of a power of advancement (f) or a power given by a settlement to a tenant for life to sell settled land (g)

Exercise of  
fiduciary  
powers

The power to appoint new trustees is also of a fiduciary character, and the committee or quasi committee can by order exercise such power (h) The trustees so appointed have the same rights and powers as they would have had if the order had been made by the High Court (i)

Exercise of  
power to  
appoint new  
trustees

Where trustees are so appointed and it seems to the judge to be for the lunatic's benefit and also expedient he may make a vesting order (k) and that by the same order as that which directs the

Vesting order

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 135 (5)

(b) *Ibid* s 143

(c) *Ibid* s 125 The application should be by summons (Rules in Lunacy 1842 rr 19 21) The jurisdiction may be exercised by the master in lunacy (*Re Shortridge (a Person of Unsound Mind)* [1895] 1 Ch 218 C A *Re Fuller (a Person of Unsound Mind not so Found)* [1900] 2 Ch 501 C A) See generally as to the powers of the master p 414 ante

(d) *Re A (a Person of Unsound Mind not so Found by Inquisition)* [1904] 2 Ch 325 C A *per* ROMER J at p 333

(e) *Ibid*

(f) *Re Nevill a Lunatic* (1885) 31 Ch D 161 C A

(g) *Re A (a Person through Mental Infirmary incapable of managing his Affairs)* [1894] 2 Ch 415 C A

(h) *Re Garrod (a Lunatic)* (1885) 31 Ch D 164 C A *Re Skeats Settlement St ats v Evans* (1889) 42 Ch D 522 C A *Re Shortridge (a Person of Unsound Mind)* *supra* The appointment should in such a case be made by him (*Re Blaloe (a Person of Unsound Mind)* [1887] W N 173 C A) but if the committee will not act the appointment of new trustees can be obtained by the beneficiaries under the jurisdiction of the High Court (*Re Sparrow* (1840) 3 Ch App 662 *Re Heaplys Trusts* (1840) 18 W R 1070) but not the Court in Lunacy (*Re Garrod (a Lunatic)* *supra*) See also title TRUSTS AND TRUSTEES

(i) Lunacy Act 1890 (53 & 54 Vict c 5) s 129

(k) *Ibid*

SECT 10  
Power  
Vested in  
Lunatic as  
Trustee or  
Guardian

Execution  
and effect of  
assurances

committee or *quasi* committee to exercise the power of appointing new trustees (*l*)

### SECT 11 — *Power to carry Orders into Effect*

**941** A committee, *quasi* committee, or such other person as the master approves can in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order (*m*) under the Lunacy Acts (*n*) as the master directs, and every such assurance and thing is valid and effectual and takes effect accordingly subject only to any prior charges to which the property affected thereby at the date of the order is subject (*o*). This provision is wide enough to enable the court to authorise the committee of a lunatic to execute a conveyance on behalf of a lunatic with all such covenants as are usual in such a conveyance including the ordinary covenants for title (*p*)

(*l*) *Re Shortridge (a Person of Unsound Mind)* [1897] 1 Ch 278 C A (stock)  
*Re Bouverie a Lunatic* (1859) 3 De G & J 658 C A (where see form of order)  
*Re Fuller (a Person of Unsound Mind not so found)* [1900] 2 Ch 551 C A (freeholds order made by the master) As to land or stock held by a lunatic as trustee see p 414 *ante* title TRUSTS AND TRUSTEES

(*m*) The Lunacy Act 1890 (53 & 54 Vict c 5) and every order made thereunder is a full discharge to the bank and every company and person for all acts done pursuant thereto or to rules thereunder so far as relates to any property in which the lunatic is interested beneficially or as trustee or as mortgagee it is unnecessary to inquire into the propriety of any order thereunder relating to such property or the jurisdiction to make the same (see *ibid* s 333)

(*n*) As to these Acts see note (*l*) p 412 *ante*

(*o*) Lunacy Act 1890 (53 & 54 Vict c 5) s 124 Lunacy Act 1908 (8 Edw 7 c 47) s 1 This provision is inserted in the Lunacy Act 1890 (53 & 54 Vict c 5) in order to supply a possible defect or to get rid of a possible doubt as to the jurisdiction to order subsidiary acts to be done when exercising a limited statutory jurisdiction It is an enabling clause not a disabling one and expressly recognises the power to do in detail that which the statute has authorised in more general terms (*Re Sefton (Earl) (a Person of Unsound Mind)* [1898] 2 Ch 378 C A *per* LINDLEY MR at p 381)

(*p*) *Re Ray (a Person of Unsound Mind)* [1896] 1 Ch 468 C A *per* KAY J at p 476 *Re Iox (a Lunatic)* (1856) 33 Ch D 37 C A is only a decision that under the particular circumstances of that case the court would not authorise a committee to enter into covenants on the lunatic's behalf (*Re Ray (a Person of Unsound Mind) supra*) Restrictive covenants on behalf of a lunatic have been authorised (*Re S A* (1906) Registrars Library Lunacy Office) By virtue of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41) s 7 (1) (1) a covenant is implied in cases where the person conveying is expressed to convey as committee of a lunatic so found by inquisition or under an order of the court and such a covenant would be binding on the conveying party personally In practice however this provision has no application since a committee never does convey as committee but always conveys in the name and on behalf of the lunatic as beneficial owner or mortgagee as the case may be, in which case the covenants implied are of course those associated with the words 'beneficial owner' or 'mortgagee' respectively (see titles MORTGAGE REAL PROPERTY AND CHATELS REAL SALE OF LAND), and are only binding on the lunatic's estate Further the expression under an order of the court is construed as meaning under an order of the High Court of Justice and does not apply to an order in lunacy authorising the committee to convey (Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41) s 2(xvii)) As to execution by the committee, compare p 447 *ante*

## PART IX —JUDICIAL POWERS OVER ESTATE

### SECT 12 —Effect of Death of Lunatic

#### SECT 12 Effect of Death of Lunatic

Abatement of proceedings pending appointment of legal personal representative.

Duty of representative

No administration by lunacy jurisdiction

**942** Proceedings in lunacy will be abated by the lunatic's death (a) and will so remain until his legal personal representative has been duly constituted. In exceptional cases and to prevent injustice there is jurisdiction to give directions ancillary to an order made during the patient's lifetime, thus the judge in lunacy may vary an order after the lunatic's death (b) and where a mortgage has been paid off before the lunatic's death a declaration may be made after such death as to the person in trust for whom the land is held (c). But as a rule no further order or direction will be made until a legal personal representative has been constituted, and costs properly incurred in the lunacy before the death will not be referred for taxation until a representative is so constituted (d).

**943** When constituted the executor or administrator will ordinarily apply for transfer of the lunatic's property to himself (e) since the master will not administer the lunatic's estate, nor decide between adverse claimants (f). A committee will not, before his discharge, be ordered to hand over documents in his possession to the personal representative of the lunatic (g). The Court in Lunacy will however, not decide who is entitled to documents or funds in its custody or in the possession of the committee (h) nor will it appoint a receiver of rents (i) nor will it entertain an application by the legal personal representative of the lunatic against the committee for an account (j) nor even when there is no adverse claim can the committee be ordered to account in

(a) *Re Way a Person of Unsound Mind* (1861) 3 De G F & J 175 C A and see *Foot v Leslie* (1885) 16 L R 11 411 where it was held that a committee could not maintain an action for rent accrued since the lunatic's death though the lunacy proceedings were still pending. As to the effect of death upon the percentage charge see p 459 *post*. As to the effect of death upon an order for payment of costs see p 460 *post*.

(b) *Re A W* (1910) Registrars Library Lunacy Office

(c) *Ex parte Grimstone* (1772) Amb 706

(d) *Re Popham* (1881) 29 W R 403 C A

(e) The application is by summons (Rules in Lunacy 1892 r 19) supported by strict evidence of the lunatic's death and the probate or letters of administration must be produced. The summons must be served on the committee although he has passed his accounts and his security has been discharged (*Re Wyldre a Lunatic* (1854) 5 De G M & G 25 C A). Prior to the Land Transfer Act 1897 (60 & 61 Vict c 65) a fund standing to a real estate account in lunacy was paid out to the heir at law on his application (*Re Wharton a Lunatic* (1854) 5 De G M & G 33 C A). But since the Land Transfer Act 1897 (60 & 61 Vict c 65) money standing to a real estate account is paid to the lunatic's legal personal representative. In the case of money standing to a copyhold account the question of title has not yet been decided but the money will not be paid out either to the legal personal representative or the customary heir unless they both attend and consent and the customary heirship must be strictly proved.

(f) *Re Ferrior (a Lunatic)* Carrow v Ferrior, Dunn v Ferrior (1867) 3 Ch App 175 181

(g) *Re Hinchcliffe* (1894) 43 W R 82 C A

(h) *Ex parte Gilbert* (1810) 1 Ball & B 297 *Weggy v Tiler* (1779) 2 Dick 552

(i) *Re Ferrior (a Lunatic)* Carrow v Ferrior, Dunn v Ferrior *supra*. As to the incapacity of a committee or quasi committee to recover rents after the death of the patient see p 434 *ante*.

(j) *Grosvenor v Drax* (1833) 2 Knapp 82 P O

**SECT 12**  
**Effect of**  
**Death of**  
**Lunatic**

lunacy for rents and income accrued since the lunatic's death (*h*), nor can the solicitor for the committee be ordered to account in the lunacy for rents so accrued and received by him as solicitor for the committee (*i*), nor will the master interfere with the legal personal representative by ordering payment of the expenses of past maintenance (*m*). In short such is the objection to administering in any way a deceased lunatic's estate that an order for sale of funds in court and payment of proceeds of sale to the legal personal representative is almost invariably refused the master holding that the estate ought to be transferred or paid to the person entitled thereto in the exact condition in which it then is. In all such cases when any rights have to be ascertained or any other relief is required an action must be commenced in the appropriate division of the High Court of Justice and pending the result of such action the lunatic's property will be retained under the jurisdiction of the Court in Lunacy (*n*).

**Actions maintainable in the Chancery Division**

**944** An action can be maintained in the Chancery Division against a committee for an account of his dealings with the deceased lunatic's estate (*o*) and when there are adverse claims to the estate the committee may without prejudice to any question of title be restrained from interfering with the rents under colour of the authority vested in him as committee (*p*) but he will not be so restrained when he has entered into and taken possession as an adverse claimant and not as committee (*q*).

**SECT 13—Court Percentage**

**Rate in the case of lunatics so found**

**945** Percentage is payable to the court at the rate of 4 per cent per annum on the clear annual income amounting to £100 and upwards of every lunatic so found by inquisition provided that no larger sum is payable in any case in any one year than £400 (*r*).

**Rate in other cases**

In the case of lunatics not so found by inquisition and of persons mentioned in the Lunacy Act 1890 (*s*) s 116 (1) (*d*) with respect to whom orders have been made, under which income is from time to time dealt with or made available percentage is payable at the rate of 2 per cent per annum on the clear annual income amounting to £100 and upwards so dealt with or made

(*l*) *Re Butler* (1866) 1 Ch App 607 *Re Walker* [1901] 2 Ch 190 C A and see p 434 ante

(*i*) *Re Butler supra*

(*m*) *Re Marman's Trustees* (168) 8 Ch D 206 C A

(*n*) *Wigg v Miller* (1719) 2 Dick 552

(*o*) *Scammell v Light* (1667) 7 I T 414 see also *Re Butler supra* *Re Walker supra*

(*p*) *Re Fitzgerald a Lunatic* (1801) 2 Sch & Lef 432 *Re Butler supra*

(*q*) *Re Butler supra*

(*r*) Rules in Lunacy 1891 r 17c. The authority for making rules and fixing percentages is vested in the Lord Chancellor with the concurrence of the Treasury pursuant to the Judicature Act 1875 (35 & 39 Vict c 77) s 26 as altered by the Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict c 49) s 6 (c) the Lunacy Act 1890 (53 & 54 Vict c 5) s 148, and the Lunacy Act 1891 (54 & 55 Vict c 60) s 27 (d)

(*s*) 53 & 54 Vict c 5, see p 429, ante

available provided that no larger sum is payable in any case in any one year than £200 (r)

SECT 13  
Court  
Percentage  
Irish and  
foreign cases

In the case of persons who have become subject to the lunacy jurisdiction by reason of the transmission of the record of an Irish inquisition and its entry of record here (a) and also in the case of persons residing abroad and declared lunatic according to their place of residence (b) percentage is only levied upon income arising from property within the jurisdiction of and administered by the master in lunacy (c)

**946** Instead of applying to a committee or *quasi* committee for payment of percentage the master may certify to the Paymaster General the amount of such percentage to be paid by him out of cash arising from dividends of the lunatic standing to his credit (d) in the lunacy whereupon the Paymaster will carry over the amount mentioned in the master's certificate to a lunacy percentage account (e)

Percentage  
payable out of  
funds in court

**947** The percentage or a proportionate part thereof as the case may require is charged upon the estate of the lunatic and is payable thereout although before payment thereof he dies or the inquisition is superseded or is vacated and discharged on a traverse but in either of the two last mentioned cases the master may if he think fit remit or reduce the amount of the sum to be paid (f)

Effect of  
death  
supersedes or  
traverse  
before pay-  
ment

#### SECT 14 — Costs

**948** The costs of all proceedings for the purpose of ascertaining whether a person is a lunatic and of all proceedings in the matter of a lunatic are in the discretion of the judge in lunacy who may order all or any of such costs to be paid by the lunatic or alleged lunatic or to be charged upon and paid out of his estate

All costs in  
discretion of  
judge

(r) Rules in Lunacy 1892 r 127 The Lunacy Act 1890 (53 & 54 Vict c 5) s 148 (1) provides that where the property of a lunatic so found does not exceed £100 in value or the income thereof does not exceed £50 per annum the master may dispense with fees and percentages but on the construction of Rules in Lunacy 1892 rr 126 127 no percentage is payable on incomes under £100 per annum whether the lunatic is so found or not In calculating the percentage payable sums less than 10s will be disregarded and will not be levied (Rules in Lunacy 1892 r 128)

(a) See pp 421 436 *ante*

(b) See p 453 *ante*

(c) Lunacy Act 1891 (54 & 55 Vict c 60) s 27 (3) When a lunatic is so found in England and the record is transmitted to Ireland where all his property is percentage is paid on the income in Ireland no percentage is payable to the English court in lunacy on the amount remitted to England for the lunatic's maintenance here (*Re Trehan (a Lunatic)* [1890] 2 Ch 12 C A)

(d) Rules in Lunacy 1892 r 134

(e) *Ibid* r 136 Where application is made to a committee or *quasi* committee the practice is to send out a printed notice requiring him to pay the amount stated on the notice by impressed stamps on such notice (*ibid* r 138) The percentage is payable out of the first moneys coming to the hands of the committee or *quasi* committee on account of his patient's income (*ibid* r 133) and on default in payment the master will certify the facts to the Treasury (*ibid* r 140) whereupon the official solicitor (see title COURTS Vol IX, p 71) will (when necessary) commence proceedings against the person in default by putting his bond in suit

(f) Lunacy Act 1890 (53 & 54 Vict c 5), s 148 (3)

SECT 14  
Conts.  
Death of  
lunatic

or any part thereof, or by any other party to the proceedings, and in the case of the death of the lunatic or alleged lunatic, an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued (g), and every such order has the effect of an order of the High Court (h)

Costs of  
unsuccessful  
petition

**949** On an unsuccessful petition the court has power (1) to order the petitioner to pay the respondent's costs or any part of them, (2) to order the respondent to pay the petitioner's costs or any part of them, (3) to leave each party to pay their own costs (i). In determining which of the above orders should be made, the points to be considered are (1) the reasons for believing in the insanity of the alleged lunatic, (2) the reasons for believing him to be not only insane but also incapable of managing himself or his affairs (3) the reasons for instituting any proceedings assuming him to be insane and incapable of managing himself or his affairs and (4) the relation in which the petitioner stands to the alleged lunatic and the objects and conduct of the petitioner (h)

General  
principle and  
its application  
with regard to  
proceedings  
in lunacy

**950** The theory upon which proceedings in lunacy are taken is that the proceedings are for the benefit and protection of the persons who are believed to be incapable by reason of mental infirmity of protecting themselves and their property. The principle therefore, applicable to a litigant who has failed in his litigation is not even *prima facie* applicable to a petitioner who asks for the protection of the law in favour of one requiring the law's protection, and if the demand for an inquiry is really prompted by a desire to protect the person and property of the alleged lunatic and is presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall upon the person so invoking the aid of the law (l). Moreover the rules against champerty do not

(g) The right to recover accrues at latest when the order for taxation is made (*Re Cumming Ex parte Turner* (1860) 9 W R. 213 C A) and both the order for payment and the order for taxation must be made within the six years (S C as reported 2 De G F & J 316 C A). Representation to the deceased lunatic's estate must be obtained and the executor or administrator must be before the court before an order is made.

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 109 which is framed in the widest possible terms so as to give the court complete jurisdiction to award costs in accordance with what may appear to be right (*Re Cathcart* [1893] 1 Ch 466 C A). Although an order as to lunacy costs will have the effect of an order of the High Court it is not an order of the High Court within the meaning of the Judicature Act 1873 (36 & 37 Vict c 66) s 49 and it is therefore, appealable without leave (*Re Cathcart supra*). As to appeals in lunacy, see p 413 *ante* and title COURTS Vol IX pp 95 96.

(i) *Re Cathcart* [1892] 1 Ch 549 C A per LINDLEY L J at p 558. It is very doubtful whether the master in lunacy has jurisdiction to order payment of costs to an unsuccessful petitioner. Such an order would exceed the powers of a judge of the High Court and could it is suggested only be made by the judge in lunacy under the Lunacy Act 1890 (53 & 54 Vict c 5) s 109.

(k) *Re Cathcart*, [1892] 1 Ch 549 C A per LINDLEY, L J at p 558 where the learned judge enumerated a fifth point to be considered. But such fifth point was subsequently disapproved by Lord HALSBURY in *Re Cathcart* [1893] 1 Ch. 466 C A. at p. 472.

(l) *Re Cathcart*, [1893] 1 Ch 466 C A per Lord HALSBURY at pp 471 472, see *Re — an Alleged Lunatic* (1889) 5 F L R 227 C A.

apply to proceedings in lunacy, and parties are to be encouraged to interfere and bring the facts before the court. This object would be impeded if agreements relative to the costs of proceedings or the ultimate division of the property were void (a)

SECT 14

Costs

**951** Solicitors acting in lunacy proceedings are entitled to charge and be allowed the fees they would be entitled to charge and be allowed for work and labour of a similar character transacted in the Chancery Division (b). But charges and expenses will not be allowed, except to committees of the estate or person unless in special circumstances the judge or master in any case directs them to be allowed (c)

Scale of costs applicable

SECT 15 — *Miscellaneous*

**952** Every office copy of the whole of an order or report confirmed by fiat purporting to be signed by a master and sealed or stamped with a seal of the master's office and every office copy of a certificate in lunacy is at all times and on behalf of all persons and whether for the purposes of the Lunacy Act 1890 (d) or otherwise admissible as evidence of the order report or certificate of which it purports to be a copy without any further proof (e)

Office copies admissibility

**953** Where an order relates to the payment transfer carrying over, or other disposal of any cash stocks funds annuities securities, or other effects standing to a lunacy credit, or to or in which a lunatic is entitled or beneficially interested the Paymaster General and the Bank of England and all other persons must act upon an office copy of the order (f), and all transfers and payments

Paymaster General and Bank of England to act on office copy order

(a) *Persse v Persse* (1840) 7 Cl & Fin 279 316 H L., see *Re E S* — (a *Supposed Lunatic*) (1876) 4 Ch D 301 C A where costs were refused to an unsuccessful petitioner. *Re C* (an *Alleged Lunatic*) (1874) 10 Ch App 75 where they were granted to such petitioner and *Re Windham* (an *Alleged Lunatic*) (1862) 4 De G F & J 53 C A where the question was much discussed

(b) Rules in Lunacy 1892 r 112. As a matter of fact this rule is to some extent ignored on the principle that the taxing master is not thereby deprived of his discretion under R S C Ord 65 r 27 (29) with reference to items specified in Appendix N (*Re Ermen Tatham v Ermen* [1903] 2 Ch 156). As to solicitors remuneration see generally title SOLICITORS

(c) Rules in Lunacy 1892 r 114. The form of direction to tax in the case of *quasi* committees is not solicitor and client costs but reasonable and proper costs and in the case of committees reasonable and proper costs charges and expenses of and incident to the order. Costs antecedent to the application are not allowed unless expressly provided for in the order. As to cases in which the committee or *quasi* committee may be allowed a salary see p 432 *ante*

(d) 53 & 54 Vict c 5

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 144. Orders in lunacy are not conclusive evidence of anything except their own existence but being made by a competent tribunal in a matter within its jurisdiction they cannot be rejected as inadmissible or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as *prima facie* evidence and if uncontradicted they ought to be regarded as sufficient evidence of those facts not only in this country but in all His Majesty's dominions (*Harvey v R* [1901] A C 601 P O per Lord LINDLEY at p 611). As to the general effect of findings of other jurisdictions see p 410 *ante*. See also title EVIDENCE Vol XIII pp 530 552

(f) Lunacy Act 1890 (53 & 54 Vict c 5), s 144,



## SECT 15

## Miscellaneous

Effect of the Lunacy Act 1890 and orders thereunder as indemnities etc

made in pursuance of the Lunacy Act 1890 (g) under a master's order or certificate will be valid and binding on all parties (h)

**954** The Lunacy Act 1890 (g) and every order purporting to be made under it is a full indemnity and discharge to the Bank of England and every other company and society and their respective officers and servants and all other persons respectively for all acts and things done or permitted to be done pursuant thereto or pursuant to the rules made thereunder so far as relates to any property in which a lunatic is interested either in his own right or as trustee or mortgagee and it is not necessary to inquire into the propriety of any such order relating to any such property or the jurisdiction to make the same (i)

## Part X—Actions by and against Lunatics

### SECT 1—Parties

Lunatics so found  
Parties

**955** A lunatic so found by inquisition sues as plaintiff and defends by his committee (l), both the lunatic and the committee of the estate being made parties to the action (l) An action commenced by a lunatic without his committee will be stayed until the committee has been added (l) and that though the finding of insanity was only a partial one (l)

Committee must sue or defend only by leave.

Before bringing or defending an action the committee must obtain the sanction of the master in lunacy (m), but provision

(g) 33 & 34 Vict c 7

(h) *Ibid* s 146

(i) *Ibid* s 33 Though an order for payment may not be mandatory but permissive in form it will nevertheless entitle the bank or other person acting thereunder to the protection afforded by the above provision (*Re Spurling* [1909] 1 Ch 199 C A) Where a question is unsuccessfully raised by the Bank of England as to the validity of an order directing it to pay or transfer stocks or funds it will not as a rule be treated as a hostile litigant but rather as *amicus curiæ* against whom no order as to costs should be made see *Re Shortridge (a Person of Unsound Mind)* [1895] 1 Ch 218 C A, but see *Re Spurling supra*

(k) R S C Ord 16 r 17 As to proceedings in matrimonial causes see title HUSBAND AND WIFE Vol XVI p 504

(l) *Re Townshend's (Lord) Settlement Townshend (Lord) v Robins* [1908] Ch 201 *Fuller v Tance* (1663) 1 Cas in Ch 18 *Farnham v Melward & Co* [1895] 2 Ch 730 735 The committee and lunatic are described in the title of the action as A B committee of the estate of C D a person of unsound mind so found by inquisition and the said C D by the said A B, his committee plaintiffs or defendants (as the case may be) (1 *Daniell's Chancery Practice* 134, 137 *Chitty's Practice* 1141) As to partial finding in lunacy see pp 420 422 *ante*

(m) *Re Hinckley* (1895) 13 L T 522 C A, *Re Notley, a Lunatic* (1839), 3 Jur 719, and see p 432, *ante*

out of a lunatic's estate for the costs of litigation will not be made until such costs have been incurred (n). If a lunatic plaintiff be made a bankrupt and the cause of action vests in his trustee in bankruptcy the committee cannot continue the action (o).

SECT 1  
Parties

Where a plaintiff becomes a lunatic so found by inquisition after action brought the next friend should give notice to the committee (p) who must be joined as co plaintiff and obtain leave to continue the proceedings (q).

Lunatic after action brought

A lunatic not so found by inquisition whether a *quasi* committee has or has not been appointed in lunacy sues by his next friend (r) and defends by his guardian *ad litem* (s). The *quasi* committee when there is one will act as next friend or guardian as the case may be having first obtained the sanction of the master in lunacy (t). If the plaintiff be in fact one he may apply to have the action dismissed and the next friend ordered to pay the costs of it (u) and in this connection an inquiry may be directed as to whether the plaintiff is of unsound mind and whether the action is for his benefit (v). When it is shown that an action is not for the plaintiff's benefit the court will stay it (u).

Lunatic not so found  
Next friend or guardian *ad litem*

**956** A foreign curator or tuteur duly appointed by a foreign court can sue in his own name and that of his lunatic for the

Proceedings by foreign curator etc.

(r) *Re Manson* (1852) 21 I J (Ct) 219 C A

(o) *Lainham v Mulward & Co* [1835] 2 Ch 730 and see *Re Lainham (a Lunatic)* [1895] 2 Ch 199 C A *Re Lainham (a Lunatic)* (No 2) [1898] 1 Ch 836 C A

(p) *Hartley v Gilbert* (1843) 13 Sim 596 *Re Irin trong (George) & Sons* [1896] 1 Ch 536

(q) *Re Green & J state Green v Iratt* (1879) 45 I J (Ct) 651

(r) R S C Ord 16 r 1, *Didisheim v London and Westminster Bank* [1900] 2 Ch 15 43 44 C A The plaintiff should be described on the writ as

A B a person of unsound mind not so found by inquisition by C D his next friend (see Chitty's Forms 570) and the next friend signs a written authority to be filed at the Central Office or the district registry if the action is proceeding therein (R S C Ord 16 r 20). This written authority however is not required where the title of the action clearly shows that the next friend is a duly appointed *quasi* committee. As to persons appointed as next friend and their removal see titles ACTION Vol I p 22 COUNTY COURTS Vol VIII pp 470 479 INFANTS AND CHILDREN Vol XVII pp 140 *et seq* and see Yearly Practice of the Supreme Court 1912 pp 141 *et seq*. A next friend will not be ordered to give security for costs on the ground of his insolvency (*Cruickshank v Knowles* (1897) unreported *per WILLS J*) though he might on the ground that he was residing abroad (*Didisheim v London and Westminster Bank* *supra* at p 44).

(s) R S C Ord 16 r 1. As to appearance by guardian see p 460 *post*.

(t) *Re Hinchcliffe* (1895) 13 L T 522 C A *Re Notley* (1839) 3 Jur 719

(u) *Palmer v Walesby* (1868) 3 Ch App 732 *Didisheim v London and Westminster Bank* *supra*

(v) *Houell v Lewis* (1891) 65 L T 672 *Pomery v Pomery* [1909] W N 149

(w) *Didisheim v London and Westminster Bank*, *supra* *New York Security and Trust Co v Keyser* [1901] 1 Ch 666 670 *Beall v Smith* (1873) 9 Ch App 85 *Forster v Porter* (1888) 37 Ch D 420, C A *Waterhouse v Horroper* (1888), 59 L T 140

## SECT 1

## Parties.

Scottish  
curator

recovery of the latter's property (x) But the court has a discretion as to directing the property to be handed over to the curator or tuteur, though an order will generally be made (u) A Scottish curator can sue and give discharges for his lunatic's personal estate in England (b) but when an English committee has been appointed the curator has no *locus standi* as against him in England (c) When a writ is issued against a lunatic so found, his committee should be added as a defendant (d) But where the lunatic is not so found the writ should be issued as though he were of sound mind and without any reference thereon to his incapacity

Effect of  
lunacy on  
retainer

957 Where a solicitor's authority has although without his knowledge been revoked by his client's supervening insanity, the solicitor will be personally liable to pay the plaintiff's costs if he enters an appearance for his client and defends an action as having warranted an authority which he did not possess (e)

SECT 2 — *Service on Lunatic Defendant*What is good  
service

958 Where a lunatic or person of unsound mind not so found by inquisition is a defendant, service on the committee or the person with whom the person of unsound mind resides or under whose care he is will, unless the court or judge otherwise orders, be deemed good service on such defendant (f)

SECT 3 — *Appearance and Default of Appearance*

Appearance

959 When an appearance is entered by a committee or quasi committee for his lunatic, the appearance *præcipe* should show the

(x) *Didisheim v London and Westminster Bank* [1900] 2 Ch 15 43 44  
C A *Thvery v Chalmers Guthrie & Co* [1900] 1 Ch 80

(a) *Re Knight (a Lunatic)* [1898] 1 Ch 257, C A *New York Security and Trust Co v Keyser* [1901] 1 Ch 666 *Re Hill* [1900] 1 I R 349 *Re Barlow's Will* (1897) 36 Ch D 257 C A

(b) *Scott v Bentley* (1855) 1 Jur (N S) 394

(c) *Re R S A* [1901] 2 K B 32 C A *Re Aytoun Ex parte Robertson Dunham* (1901) 36 L J 407

(d) For title of action see note (l) p 462 ante

(e) *Yonge v Loynbee* [1910] 1 K B 215 C A See also as to the solicitor's liability for costs of a futile action *Re Dunn Simmons v Liberal Opinion Ltd* [1911] 1 K B 966 C A and compare title INFANTS AND CHILDREN Vol XVII p 139 note (+) As to solicitor's retainer see title SOLICITORS

(f) R S C Ord 9 1 5 The object is that service shall be effected upon some person qualified to act for the lunatic or most likely to know to whom the fact of the service ought to be communicated (*Fore Street Warehouse Co v Durrant supra per GROVE J* at p 473 and see *Camps v Marshall* (1873) 8 Ch App 462 *Blyth v Green* [1876] W N 214) In the case of a lunatic not so found service on the keeper or medical officer of the asylum where he was detained has been allowed (*Thorn v Smith* [1879] W N 81, *Raine v Wilson* (1883) 48 L J (CH) 469), and the keeper of an asylum who refuses to allow service is liable to attachment (*Denson v Hardinge*, [1867] W N 17), service on the defendant's business manager is insufficient (*Fore Street Warehouse Co v Durrant, supra*)

## PART X — ACTIONS BY AND AGAINST LUNATICS

committee's or quasi-committee's representative capacity, and state the date of the order in lunacy appointing him. It will not then be necessary to apply for the appointment of a guardian *ad litem*. When no proceedings in lunacy have been taken, the appearance should be entered as though the lunatic were of sound mind, and a guardian *ad litem* then applied for (g). On default of appearance by a lunatic not so found by inquisition the plaintiff must, before taking any further step in the action, apply to the court for the appointment of a guardian *ad litem* (h).

**SECT 3**  
**Appearance**  
**and Default**  
**of Appear**  
**ance**

Form of  
*praecipe*  
Appointment  
of guardian  
*ad litem*

### SECT 4 — Subsequent Proceedings

**960** Any consent as to the mode of taking evidence or as to any other procedure if given with the consent of the court or a judge by the next friend, guardian or committee of a person under disability has the same force and effect as if such party were under no disability. But a committee's consent is invalid as between himself and the lunatic unless given with the consent of the judge in lunacy (i).

Consents

**961** The non denial by a lunatic whether so found or not of allegations of fact in any pleading does not amount as against him to an admission thereof (l).

Pleading  
Admissions

No special case to which a person of unsound mind not so found is a party can be set down for argument without the leave of a court or a judge (l).

Special case

(g) *Cutbush v Cutbush* (1893) 37 Sol Jo 680. The appointment of such guardian is obtained in the King's Bench Division by an *ex parte* application to a master supported by an affidavit and in the Chancery Division by a petition of course lodged with the senior registrar. A guardian *ad litem* may be appointed at the instance of a co-defendant (*Re Dawson Johnston v Hill* (1889) 41 Ch D 415). A married woman is not eligible for the post (*Re Somerset (Duke) Phynne v St Maur* (1887) 34 Ch D 460). When the official solicitor (as to whom see title COURTS Vol IX p 71) is appointed guardian *ad litem* he has no greater rights and is in no better position than any other solicitor appearing for a defendant except that probably he will be allowed costs properly incurred in the conduct of the defence (*Gill v Gill* [1909] P 157 and compare *Eady v Eledon* [1901] 2 K B 460 O A and *Goatly v Jones* [1907] W N 161). If a lunatic recovers his sanity he can apply to discharge the order appointing a guardian *ad litem* (*Dunn v R* (1900) 44 Sol Jo 731).

(h) R S O Ord 13 r 1. The application is made after the time limited for entering an appearance has expired and notice of the application must be served six clear days before the hearing upon or left at the dwelling house of the person with whom or under whose care the defendant was at the time of the service of the writ (*ibid*).

(i) R S O Ord 16 r 21. Notwithstanding this rule it has been held that a guardian *ad litem* can consent to any matter relating to the conduct of a cause without any order (*Kryer v Wiseman* (1876) 24 W B 205 *Faggott v Toogood* [1904] W N 130 *Knatchbull v Fowle* (1876) 1 Ch D 604). By the Judicature Act 1899 (62 & 63 Vict c 6) s 1 the sanction of the court or a judge must be obtained before a consent to a final appeal being heard by two Lords Justices instead of three is given on behalf of a person of unsound mind. As between a committee and his lunatic the consent will not be valid unless previously sanctioned by the Lord Chancellor or Lords Justices.

(k) R S O Ord 19 r 13. As to pleading generally see title PLEADING.

(l) R S O Ord 34 r 4. On an application for such leave, evidence must be filed that the statements contained in the special case so far as the

## SECT 4

Subsequent  
Proceed-  
ings

Discovery

Stay of  
execution

Injunction

Damages  
application of

The committee next friend, or guardian *ad litem* of a lunatic cannot be compelled to answer interrogatories (*m*) or to make discovery of documents (*n*)

If judgment is obtained against a lunatic defendant a stay of execution may be granted (*o*) to enable an application to be made by the committee or *quasi* committee to the Court in Lunacy for leave to pay the amount of the judgment debt out of the lunatic's estate (*p*)

An injunction may be granted against a lunatic (*q*) Money or damages recovered by or on behalf of a person of unsound mind not so found in the King's Bench Division must unless the court or a judge otherwise directs be paid to the Public Trustee to be applied by him for the maintenance and benefit of the plaintiff (*r*)

## Part XI—Administration with regard to the Reception and Care of Lunatics

### SECT 1—*The Commissioners in Lunacy*

General  
functions

**962** The Commissioners in Lunacy discharge amongst other duties hereinafter more particularly referred to the following functions—They visit asylums (*a*) and licensed houses (*b*) make rules as to the management thereof (*c*) see patients and investigate and deal with patients (*d*) grant licences for private asylums within their jurisdiction (*e*) and report to the Lord Chancellor and also to Parliament (*f*)

same affect the interest of the lunatic are true (R S C Ord 34 r 4) and on entering the case for argument a copy of the judge's order giving leave must be produced (*ibid* r 5)

(*m*) *Ingram v Little* (1883) 11 Q B D 251 See title DISCOVERY INSECTIONS AND INTERROGATORIES Vol XI pp 48 49

(*n*) *Curtis v Mundy* [1892] 2 Q B 155 *Dyle v Stephens* (1885) 30 Ch D 151 where *Hugkinson v Hall* (1819) 10 Ch D 230 was not followed

(*o*) *Burt v Blackburn* (188 ) 3 T L R 356 C A For rights of creditors as against a lunatic's property when such property comes under the protection of the Court in Lunacy see p 440 *ante*

(*p*) *Annes v Irlinson* (1847) 2 Ph 388

(*q*) *J v S* [1894] 3 Ch 72

(*r*) R S C Ord 22 r 15 These provisions apply to damages awarded under the Fatal Accidents Act 1846 (9 & 10 Vict c 93) (R S C Ord 22 r 15) As to the Public Trustee generally see title TRUSTS AND TRUSTEES

(*a*) Lunacy Act 1890 (53 & 54 Vict c 5) s 187

(*b*) *Ibid* s 191

(*c*) *Ibid* s 226

(*d*) *Ibid* s 194 See p 471 *post*

(*e*) Lunacy Act 1890 (53 & 54 Vict c 5) s 208 The Commissioners' immediate jurisdiction extends to the cities of London and Westminster the counties of London and Middlesex and the following parishes and places—that is to say Barnes Kew Green Mortlake Merton Mitcham and Wimbledon in the county of Surrey Southend in the county of Kent and East Ham Leyton Leytonstone Low Leyton Ilford West Ham and Walthamstow in the county of Essex and also every place within the distance of seven miles from any part of the cities of London or Westminster or of the borough of Southwark (*ibid* Sched III)

(*f*) *Ibid* s 182

Commissioners in receipt of a salary, voted by Parliament must be either medical practitioners or barristers of not less than five years' standing (7) Their appointment, the appointment of their secretary and clerks, their meetings and procedure and their reports to the Lord Chancellor and to Parliament are dealt with in the Lunacy Act, 1890 (h)

# SECT 1 The Commissioners in Lunacy

Qualifications  
of paid Com-  
missioners

## SECT 2—The Visitors in Lunacy

**963** Visitors in lunacy, commonly referred to as Chancery visitors, discharge amongst other functions the duty of visiting lunatics so found by inquisition (i) and also persons not so found but with reference to whom proceedings have been taken in lunacy (k) They act in concert with and under the direction of the masters in lunacy who are *ex officio* members of their board (l) Not infrequently where on a lunacy application conflicting medical evidence is filed the visitors are instructed to visit and report on the condition of the patient and they also consider the suitability of the scheme for maintenance sanctioned by the master and call for statements of account from the committee of the person (m) Visitors other than a master in lunacy, must be medical practitioners or barristers of not less than five years' standing (n)

Chancery  
visitors

Board of  
visitors

**964** For every asylum there must be a visiting committee of not less than seven members appointed annually by the local authority (o) at their quarterly meeting in November (p) Such visiting committee hold office until the first meeting of their successors (p), or if default is made in electing a new committee,

Visiting  
committees

(7) Lunacy Act 1890 (33 & 34 Vict c 5) s 150 See title BARRISTERS Vol II p 362

(h) Lunacy Act 1890 (53 & 54 Vict c 5) ss 160—162 There are five honorary Commissioners and three medical and three legal Commissioners Their office is situate at 66 Victoria Street S W

(i) *Ibid* s 163

(k) Rules in Lunacy 1893 r 5

(l) Lunacy Act 1890 (33 & 34 Vict c 5) s 167

(m) Rules in Lunacy 1892 r 107 The appointment of Chancery visitors their powers and their duties are dealt with in the Lunacy Act 1890 (33 & 34 Vict c 5) ss 163—166 183—186 and in the Rules in Lunacy 1892 rr 100—109 There are one legal and two medical visitors

(n) Lunacy Act 1890 (53 & 54 Vict c 5) s 169 (1) For the definition of a local authority see *ibid* s 240 and note (h) p 479 *post*

(o) Lunacy Act 1890 (33 & 54 Vict c 5) s 170 The date for the election of the members of a visiting committee is not affected by the County Councils (Elections) Act 1891 (54 & 55 Vict c 68) (55 J P 796) In the case of a district asylum the number of members of the committee is fixed by the agreement under which the asylum is provided (Lunacy Act 1890 (53 & 54 Vict c 5) s 169 (2)) Where there is more than one asylum the local authority may appoint one committee and the latter may appoint a sub-committee for each separate asylum (*ibid* s 169 (3)) And where a county borough or a borough not being a county borough has contributed to the cost of any county asylum such borough will be entitled to appoint members on the visiting committee (*ibid* s 169 (4) (5)) Boroughs the councils of which are local authorities under the Lunacy Act 1890 (53 & 54 Vict c 5) (see *ibid* Sched IV) must during the continuance of a contract for the reception of their pauper lunatics into a county asylum appoint a committee to visit such lunatics in the county asylum (*ibid* s 169 (6))

(p) *Ibid* s 170 (1) Until the first meeting of their successors the old

**SECT. 2.** the committee last elected continue in office as if they had been duly re elected (a)

**The Visitors in Lunacy**

**Examination of accounts**

**Clerk**

A visiting committee must before June in every year examine the accounts of the treasurer and clerk of the asylum and report the same to the next meeting of the local authority (b)

Every visiting committee must appoint a clerk (who may also be the clerk to the asylum) at such salary as they think fit, who continues in office unless sooner discharged so long as the members of the committee continue in office (c) The visiting committee may sue and be sued in the name of their clerk and an action by or against them does not abate by reason of the death or removal of the clerk but the clerk for the time being is always deemed the plaintiff or defendant in the action (d)

**Visitors appointed by justices**

**965** The justices of every county and quarter sessions not within the immediate jurisdiction of the Commissioners (e) must (f) annually appoint (g) three or more justices and also one medical practitioner or more (h) to act as visitors of licensed houses within the county or borough and otherwise for the purposes of the Lunacy Act, 1890 (i) Meetings of visitors are in their discretion

committee can enter into contracts which will bind such successors On the death or resignation of a visitor vacancies may be filled up by the authority which made the original appointment and continuing members may act notwithstanding any vacancy (Lunacy Act 1890 (53 & 54 Vict c 5) s 1, 1)

(a) *Ibid* s 172 (2) A member of a visiting committee must not be interested in any contract entered into or work done for the committee and must not derive any profit from the funds of the asylum but this provision does not disable a member from holding shares in a company which has entered into a contract with the visiting committee though it will disable him from voting in respect of such contract (*ibid* s 174) The meeting of a visiting committee the appointment of their chairman and other incidental matters are governed by the Local Government Act 1888 (51 & 52 Vict c 41) s 82 if the committee are appointed by a county council otherwise their procedure is regulated by the Lunacy Act 1890 (53 & 54 Vict c 5) s 175

(b) *Ibid* s 173

(c) *Ibid* s 1, 6 (1) which in effect, requires the reappointment of the clerk every year

(d) *Ibid* s 176 (2) and see *ibid* s 325 and p 469 *post* An action may be maintained against a visiting committee in the name of their clerk in respect of a contract properly entered into by a former committee (*Hendall v King* (1856) 17 C B 483 and see also *Devenish v Brown* (1856) 26 L J (CH) 23)

(e) As to the immediate jurisdiction of the Commissioners see p 466 *ante*

(f) They must be appointed whether there is a licensed house within the county or borough or not since there are other duties for them to perform e.g. under the Lunacy Act 1890 (53 & 54 Vict c 5) s 199 (2) on the request in writing of the Commissioners to visit single patients detained in unlicensed houses

(g) These appointments will be made by justices of a county at their Michaelmas quarter sessions and by justices of a borough at special sessions in October Other appointments may be made at quarter sessions or at special sessions held at the same time as any quarter sessions (*ibid* s 177 (7)) An appointment of a visitor by borough justices requires the written approval of the recorder of the borough (*ibid* s 180)

(h) As to remuneration see note (n) p 469 *post*

(i) Lunacy Act 1890 (53 & 54 Vict c 5) s 177 (1) Interest in a licensed house will disqualify for the post of visitor (*ibid*, s 177 (3) (4)) The clerk to the justices of a quarter sessions borough must notify to the clerk of the peace of the borough the names addresses and qualifications of the visitors (*ibid* s. 177 (9)) and these must within fourteen days of appointment be advertised

## PART XI — ADMINISTRATION,

and appointments therefor are kept secret so that managers or persons interested in the house to be visited may have no notice of the intended visit beforehand (*k*)

### SECT 2 The Visitors in Lunacy

Clerk to the  
visitors

The clerk of the peace or some other person to be appointed (*l*) by the justices for the county or borough will act as clerk to the visitors (*m*) at a salary to be fixed by the justices (*n*) Such clerk may employ at his own cost an assistant approved by a visitor who is also a justice (*o*), but neither the visitor clerk nor assistant clerk may be interested in any licensed house nor may they have been so interested within one year prior to appointment (*p*)

### SECT 3 — Visitation

#### SUB SECT 1 — Chancery Visitors

**966** Chancery visitors visit lunatics so found by inquisition at such times and in such manner and make such inquiries as to their treatment and health as the Rules in Lunacy or as any special order of the judge in lunacy (*q*) in any particular case may from time to time direct But every lunatic must be personally seen by one visitor at least twice a year and the interval between successive visits must in no case exceed eight months Where a lunatic is residing in a private house he must during the two years next following inquisition, be visited at least four times in every year (*r*)

Visits conducted in accordance with Rules in Lunacy

Number of annual visits

**967** Chancery visitors must upon the request of the master visit and report as to any person with reference to whom or to whose estate any application is pending before or an order has been made by the master (*s*) They must also visit such persons alleged to be lunatics and must make such inquiries and reports as the judge directs (*t*)

Visits on request of master  
Visits on alleged lunatics

in a local paper and within three days of appointment be sent to the Commissioners by the clerk of the peace (Lunacy Act 1890 (53 & 54 Vict c 5) s 177 (10)) Default in publishing and sending this list renders the clerk liable to a penalty of £2 (*ibid* s 177 (11))

(*k*) *Ibid* s 181

(*l*) The appointment of a clerk by the borough justices requires the written consent of the recorder of the borough (*ibid* s 180) and he must be reappointed annually (see 55 J P 589)

(*m*) Lunacy Act 1890 (53 & 54 Vict c 5) s 178 (1) The name address occupation and profession of the appointee must within fourteen days of appointment be advertised in a local paper and within three days of appointment be sent to the Commissioners by the clerk of the peace (*ibid* s 178 (3)) Default in publishing and sending this information renders the clerk liable to a penalty of £2 (*ibid* s 178 (4))

(*n*) *Ibid* s 178 (5) The salary of the clerk is fixed by the borough justices under *ibid* s 178 (5) and paid out of the borough funds under *ibid* s 225 The remuneration of the medical practitioner is also fixed by the justices under *ibid* s 177 (12) and paid out of the borough funds under *ibid* s 225 The remuneration may take the shape of a salary but the Act contemplates that the remuneration should be for services rendered so that where there is no licensed house in a particular borough the clerk and medical practitioner will only be entitled to remuneration when called upon to discharge any duties under the Act (see 54 J P 623)

(*o*) Lunacy Act 1890 (53 & 54 Vict c 5) s 179

(*p*) *Ibid* s 177 (3) (4) As to licensed houses, see p 411 *post*

(*q*) As to the judge in lunacy see p 412 *ante*.

(*r*) Lunacy Act 1890 (53 & 54 Vict c 5) s 183

(*s*) Rules in Lunacy 1893 r 6

(*t*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 184 (1).



## SECT 3

## Visitation

## Returns

## Nature of reports.

**968** At the end of every six months Chancery visitors must report to the Lord Chancellor on the number of visits made, of patients seen and of miles travelled and make a return of their travelling expenses and a copy of every such report and return is laid before Parliament (u)

They must report to the Lord Chancellor on the state of mind bodily health and general condition and care and treatment of every person visited and also any instance on which on proceeding to visit they have been unable to discover the lunatic's residence or for any other reason have been prevented from actually seeing him (v) These reports are to be filed in the office of the Chancery visitors (a)

## SUB SECT 2 — Asylums

## Visits to asylums by Commissioners

**969** Two or more Commissioners of whom one must be a doctor and one a barrister must once at least in every year visit every asylum and one or more of the Commissioners may at any time visit any asylum and make the inquiries specified in the Lunacy Act 1890 (b) s 187 as to the proper construction and management of the asylum and the treatment food and condition of the patients therein and as to such other matters as the visiting Commissioners think fit (c)

## Visits to asylums by visiting committee

**970** As regards visiting committees appointed by local authorities (d) at least two members of the committee must together once at least in every two months inspect every part of the asylum and see every patient therein so as to give everyone an opportunity of complaint (e), and examine the certificates and books and enter any remarks they think proper in the visitors book and sign the same (f) In the case of lunatics received in a county asylum under contract from a borough (g) the lunatics received under contract must be visited at least once in six months by at least two members of the visiting committee of the borough appointed *ad hoc*

(u) Lunacy Act 1890 (33 & 34 Vict c 5) s 184 Where a petition for an inquiry into the state of mind of an alleged lunatic was presented and disputes arose as to the terms under which access of medical witnesses should be allowed the court made an order that two of the visitors should see the alleged lunatic and report to the court (*Re — an Alleged Lunatic* (1851) 18 Ch D 26 C 4)

(v) Lunacy Act 1890 (33 & 34 Vict c 5) s 185

(a) As to the inspection and destruction of these reports see *ibid* s 186 and pp 42, 428 *ante*

(b) 33 & 34 Vict c 5

(c) *Ibid* s 184

(d) See p 467 *ante*

(e) The Commissioners state with reference to the opportunity of complaint that it is a means of appeal to which the legislature has evidently attached much importance and which we know conduces greatly to tranquillity and contentment (Commissioners 39th Report, p 329) and the matter is one of much importance to the well being and contentment of the patients" (*ibid*, p 341) In the yearly reports there are usually one or two references to complaints made by patients that the visiting committee have not complied with the above provision and in each case the Commissioners drew the attention of the visiting committee to these complaints as an instance see the Commissioners 56th Report p 367

(f) Lunacy Act, 1890 (33 & 34 Vict c 5), s 188.

(g) See p 180 *post*.

and the result of the visit must be reported to the council of the borough (*h*) Provision is also made for an annual report by the visiting committee of every asylum to the local authority as to the state and condition of the asylum (*i*)

SECT 8  
Visitation  
—

SUB SECT 3 — *Hospitals and Licensed Houses and Single Patients*

**971** Every hospital and licensed house may at any time by day or night be visited by any one or more of the Commissioners (*k*) Licensed houses not within their immediate jurisdiction (*l*) must be visited twice a year by two (*m*) Commissioners (*n*) and licensed houses within their immediate jurisdiction (*l*) must be visited four times a year by two or more (*m*) Commissioners (*n*) and in addition twice a year by one or more of the Commissioners (*p*) All visits must be made without previous notice (*q*)

Visits to  
hospitals and  
licensed  
houses by  
Commissioners  
SECT 8

**972** As regards visitors appointed by justices every licensed house within their jurisdiction may at any time by day or night be visited by one or more of the visitors and must be visited four times a year by two visitors (one being a medical practitioner) and in addition twice a year by one or more of the visitors (*r*)

Visits to  
licensed  
houses by  
visiting  
committee

**973** The visiting Commissioners and visitors must at every visit to a hospital and licensed house inspect every part of the buildings see every patient peruse orders and certificates and observations in the visitors book and make entries therein and also inquire as to the occupations classifications conditions and diet of the patients and of any other matter which in their view requires investigation (*s*)

Duty of Com-  
missioners  
and visitors  
on inspection

Every Commissioner visiting a house licensed by justices must carefully consider the state of mind of any patient as to the propriety of whose detention there is a doubt or as to whose sanity

(*h*) Lunacy Act 1890 (33 & 34 Vict c 5) s 189 (1)

(*i*) *Ibid* s 190

(*k*) *Ibid* s 191 (1)

(*l*) As to the immediate jurisdiction of the Commissioners see p 46C *ante*

(*m*) One of the Commissioner must be a doctor and one a barrister Lunacy Act 1890 (33 & 34 Vict c 5) s 191 (1) (a) (c) (d)

(*n*) *Ibid* s 191

(*o*) *Ibid* s 191 (2) (a)

(*p*) *Ibid* s 191 (2) (b) Under certain conditions the Lord Chancellor has power by writing under his hand to relax the number of visits to be made by the Commissioners (*ibid* s 191 (2))

(*q*) *Ibid* s 191 (c) On their first visit to a house licensed by justices after the grant or renewal of the licence the Commissioners must examine the licence and if the same is in order sign it or if it is informal enter in the visitors book in what respect it is informal (*ibid* s 192)

(*r*) *Ibid* s 19

(*s*) *Ibid* s 194 A manager who fails to show to the Commissioners or visitors any part of the hospital or licensed house or conceals any patient or refuses to answer questions is guilty of a misdemeanour (*ibid* s 194) Let the penalty see p 579 *post* He must also produce to the Commissioners or visitors a list of his patients the books kept by him pursuant to the Lunacy Act 1890 (33 & 34 Vict c 5) or the rules made thereunder orders and certificates his licence (if any) and such further information as to any patient as may be required and each Commissioner and visitor must sign the books as having been produced (*ibid* s 196)

**SECT 3**  
**Visitation**

his attention is specially called, and if the state of mind of the patient is considered doubtful and the propriety of his detention requires further consideration, a note thereof must be made in the patients book (t) A copy of this note must be sent by the manager of the house to the clerk of the visitors (u) within two days, and the visitors, or two of them (one being a medical practitioner), must immediately visit the patient and act as they think fit (x)

**Visits to  
single  
patients.**

**974** One or more of the Commissioners must annually and may at all reasonable times visit every unlicensed house in which a single patient is detained as a lunatic and report to the Commissioners as to the patient's treatment and bodily and mental health (a) Visitors appointed for a county or borough must also, upon the request in writing of the Commissioners, visit single patients and report (b)

**SUB SECT 4 — Pauper Lunatics**

**Visits to  
pauper  
lunatics  
confined in  
institutions.**

**975** A medical practitioner appointed by the guardians of a union, and also the guardians, must be permitted whenever they see fit between the hours of 8 a.m. and 6 p.m. to visit and examine any pauper lunatic chargeable to the union confined in an institution for lunatics unless the medical officer of the institution delivers to the intending visitors a statement signed by him certifying that for the reasons mentioned the visit would be injurious to the lunatic (c)

**Visits to  
pauper  
lunatics not  
so confined**

Every pauper lunatic (d) not in an institution for lunatics must once in every quarter be visited if not resident in a workhouse by the medical officer (e) of the union in which the lunatic is resident

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 197 (1)

(u) Failure on the part of the manager to notify the clerk or on the part of the clerk to communicate forthwith with the visitors is a misdemeanour (*ibid* s 197 (3)) For the penalty see p 528 *post*

(x) Lunacy Act 1890 (53 & 54 Vict c 5) s 197 (2)

(a) *Ibid* ss 198 199 (1) Refusal to show the Commissioner any part of the house and grounds is a misdemeanour (*ibid* s 200) For the penalty see p 528 *post*

(b) Lunacy Act 1890 (53 & 54 Vict c 5) s 199 (2) Medical journals must be produced to and signed by the person visiting pursuant to *ibid* s 199 (1) (2) (*ibid* s 199 (3)) and the reports are kept by the secretary to the Commissioners and if they think it expedient laid before the Lord Chancellor (*ibid* s. 199 (4))

(c) *Ibid* s 201 (1) The medical officer must forthwith enter in the medical journal the reasons mentioned and sign the entry (*ibid* s 201 (2))

(d) A pauper lunatic is one who is in receipt of relief and although by *ibid* s 18 a person who is visited by the medical officer of the union at the expense of the union is for the purposes of that section to be deemed to be in receipt of relief so that if a lunatic is sent to an asylum at the instance of the relieving officer he may be sent under that section as a pauper yet a mere order from the relieving officer to the medical officer to visit would not appear to make the lunatic a pauper unless he is so otherwise or entitle the medical officer to a fee for certifying under *ibid* s 202 (4)

(e) Each medical officer is entitled to 2s 6d for each quarterly visit to a pauper not in a workhouse and also to 2s 6d for each report to the visiting committee which sums must be paid by the same persons and charged to the same account as the relief of the pauper (*ibid*, s 202 (4)) Guardians must furnish the medical officers with proper forms for the prescribed returns (*ibid* s. 202 (2))

**SECT 3.**  
**Visitation**

and if resident in a workhouse by the medical officer of the workhouse (*f*) Where the lunatic is lawfully in the custody of a relative or friend to whom an allowance is made for the lunatic's maintenance, the medical officer must, within three days after each visit, send to the visiting committee a report stating whether the lunatic is properly taken care of and may properly remain out of an asylum (*g*)

**976** Any one or more of the Commissioners must on being directed by resolution of the Commissioners, visit workhouses in which there is or is alleged to be any lunatic and inquire whether the provisions of the law have been carried out and also as to dietary, accommodation and treatment and report to the Commissioners and the Commissioners must forward a copy of every report to the Local Government Board (*h*)

Visits to  
pauper  
lunatics by  
Com  
missioners

**SUB SECT 3 — Special Cases**

**977** In any case which appears to them to call for immediate investigation, the Commissioners may direct any competent person (*i*) to visit and report upon the mental and bodily condition of any lunatic or alleged lunatic or as to any other matter into which the Commissioners are authorised to inquire (*k*) And the Lord Chancellor in the case of a lunatic so found and the Lord Chancellor or a Secretary of State in any other case may direct the Commissioners (*l*) or any one of them or any other person (*m*) to make a similar visit inspection, and report (*n*)

Immediate  
investigation

**978** Where without an order and certificates any person is detained or treated without payment as a lunatic or is in any charitable religious, or other establishment not being an institution for lunatics the Commissioners may require from the person in charge periodical medical reports as to the condition of the patient and all such other particulars as to him and his property as they think fit (*o*) and the Commissioners may visit and report as to the patient and may exercise with reference to the patient all the powers except that of discharge given to them as to persons confined in an institution for lunatics or as to single patients (*p*)

Reports on  
and visits to  
person  
detained with  
out an order  
or certificate

(*f*) Lunacy Act 1890 (53 & 54 Vict c 5) s 202 (1)

(*g*) *Ibid* s 202 (3) The above provisions do not remove the liability of the medical officer to give notice as to any pauper lunatic who ought to be sent to an asylum under *ibid* ss 14 (1) or 24 (6) (*ibid* s 202 (5)) As to the medical officer's remuneration see note (*e*) p 472 *ante*

(*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 203

(*i*) Such person has for the special purposes of the visit all the powers of a Commissioner (*ibid* s 204 (2)) and may be allowed a reasonable remuneration for his services (*ibid* s 204 (3))

(*k*) *Ibid* s 204 (1)

(*l*) Who are allowed travelling and other expenses (*ibid* s 204 (3))

(*m*) Who may be allowed a reasonable fee for his services and travelling and other expenses (*ibid* s 205 (2) (3))

(*n*) *Ibid* s 205 (1)

(*o*) *Ibid* s 206 (1) The reports are to be kept secret and are to be open only to the inspection of the Commissioners and the Lord Chancellor and persons authorised by the latter (*ibid* s 206 (6))

(*p*) *Ibid* s 206 (2) On a report from the Commissioners the Lord Chancellor

## SECT 4

Licensed  
Houses and  
Hospitals

## Definition

SECT 4—*Licensed Houses and Hospitals*SUB SECT 1—*Licensed Houses*

**979** A licensed house is a private establishment which is licensed for the reception of a definite number of lunatics with, in some cases, restrictions as to the class or sex of the patients (*q*) No licence can now be granted except in renewal of or substitution for some existing licence (*r*) and no licence can be granted for a greater number of lunatics than the number authorised by the existing licence (*s*) or for a longer period than thirteen months (*t*)

Licensing  
authorities

**980** The licensing authorities are—

(1) In places within their immediate jurisdiction (*a*), the Commissioners (*b*)

(2) In all other places (*a*) the justices for every county and quarter sessions who are the licensing justices and will exercise their jurisdiction at quarter or special sessions respectively (*c*)

may discharge the patient or order his removal to an institution for lunatics and the expenses of the order and of the patient's maintenance must be paid by the union where he was found until the authority legally liable therefor has been ascertained when the union will be entitled to be recouped by such authority (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 206 (3)) and the ordinary justices jurisdiction of making adjudication and maintenance orders (see pp 469 *et seq post*) will attach (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 206 (1))

(*r*) To receive more patients than is authorised by the licence or to fail to comply with the regulations as to the sex of the patient or the class of patient renders the licensee liable to a fine of £50 for each patient received contrary to his licence (*ibid* s 20) and the penalty shall be as follows

(*r*) Lunacy Act 1890 (*33 & 34 Vict c 5*) s 20; (*b*) see p 469 *post*

(*s*) Lunacy Act 1890 (*33 & 34 Vict c 5*) s 20; (*t*)

(*t*) *Ibid* s 216

(*a*) As to places within the immediate jurisdiction see note (*e*) p 466 *ante*

(*b*) Lunacy Act 1890 (*33 & 34 Vict c 5*) s 205 (1)

(*c*) *Ibid* s 205 (2) and the above purposes the justices of every borough must assemble in special sessions at such times as the quarter sessions for the borough are held (*ibid* s 209) No one who is or has been within one year preceding interested in a licensed house can act in the granting of a licence (*ibid* s 205 (3)) In the case of an application to justices for a licence notice of the application should be given to the clerk of the peace of the borough in which the house is situate Accompanying the notice should be a plan of the house and building drawn according to the provisions in the Lunacy Act statement of the quantity of land annexed to the house and a statement of the number of patients of each sex to be received Copies of the above must also be sent by the applicant to the Commissioners The licence is drawn by the clerk of the peace Where a special sessions is held the clerk to the justices summons it and he must attend the meeting to advise the justices The sessions need not be held on the same day as the quarter sessions A copy of the plan given to the Commissioners or justices on applying for a licence must be hung in a conspicuous part of the licensed house (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 227) To supply wilfully untrue or incorrect information for the purpose of obtaining a licence is a misdemeanour (*ibid* s 214) and the penalty see p 425 *post* Copies of licences granted by justices must be sent to the Commissioners within seven days (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 215)

The charges for licences are—

(1) A 10s stamp and (2) 10s for every non pauper and 2s 6d for every pauper patient but in no case less than £15 under this head unless the licence is for less than thirteen months when the payment may be reduced to not less than £5 (*s*) the charge for a licence for transfer to a new house must not be less than £1 exclusive of the stamp (*ibid* ss 216 217) Licences (according as

## SECT 4

Licensed  
Houses and  
HospitalsApplication  
of licence  
chargesTo whom a  
licence may  
be granted

**981** Moneys received for licences granted by justices must be paid by the clerk of the peace for the county or borough into the county or borough fund (*d*), and the justices in quarter or special sessions may order the reasonable remuneration (*e*) of the visitors and their clerk (*f*) and all other proper expenses to be paid to the clerk of the peace out of the county or borough fund (*g*)

**982** A renewed licence or a new licence can only be granted—

(1) To the former licensees or any one or more of them or to their successors in the business if it appears (*h*) that the house has been in all respects well conducted by the licensees (*i*)

(2) To the licensees of an existing house in respect of a new house when it is shown (*h*) that it would be for the comfort and advantage of the patients that the new house should be substituted (on the same terms, restrictions and conditions) for the old one (*i*)

(3) To joint licensees who desire to carry on business apart provided

(a) the joint establishment and the proposed new house both answer the conditions required for the granting of a new licence and

they are granted by the (Commissioner or justice) are under the seal of the (Commissioner or under the hand of at least three justices (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 216) and they are not to be delivered until the fees have been paid (*ibid* s 217 (5))

(*d*) *ibid* s 214 (1) The clerk of the peace must keep proper accounts (*ibid* s 214 (2)) to be signed by at least two of the justices and in the case of a clerk of the peace for a county such accounts must be audited in accordance with the Local Government Act 1888 (*51 & 52 Vict c 41*) s 1 (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 221 (3))

(*e*) The reasonableness of the sums ordered to be paid is for the justices to decide

(*f*) As to visitors see p 46, *ante*. In the case of boroughs having a separate court of quarter sessions and commission of the peace which contained according to the census of 1881 a population of less than 10,000 the Local Government Act 1888 (*51 & 52 Vict c 41*) has not transferred from the borough to the county council the obligation of paying the salary of the borough justices see *Thetford Corporation v Norfolk County Council* [1898] 1 Q B 111 affirmed 2 Q B 165 C A the decision in which would seem to apply to visitors clerk's salary

(*g*) Lunacy Act 1890 (*33 & 34 Vict c 5*) s 220 (1) Payments are made out of the county or borough fund by the treasurer and allowed in his accounts on the authority of the justices order (*ibid* s 220 (2)) But sums ordered to be paid by justices of a county are subject to the sanction of the standing joint committee of the county council and quarter sessions as provided by the Local Government Act 1888 (*51 & 52 Vict c 41*) s 66 (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 220 (3))

(*h*) The persons to be satisfied are the Commissioners in the case of a house within their immediate jurisdiction (see note (*e*) p 466 *ante*) and the justices in the case of a house licensed by or within the jurisdiction of the justices (Lunacy Act 1890 (*33 & 34 Vict c 5*) s 207 (1) (3) (4)) But the Commissioners cannot grant a licence for a new house within their jurisdiction if the old house is within the jurisdiction of the justices nor can the justices grant a licence for a new house if the old house is within the jurisdiction of other justices or of the Commissioners (Commissioners with Report p 14)

(*i*) Lunacy Act 1890 (*33 & 34 Vict c 5*) s 207 (1)

(*j*) *ibid* s 204 (3) On the proposed transfer of patients to a new house not previously licensed seven clear days' notice of the intended substitution (unless the same is occasioned by fire or tempest) must be sent to the person

## SECT 4

**Licensed  
Houses and  
Hospitals**

(b) no larger number of patients is detained under the renewed licences at both establishments than under the old licence at one establishment (*l*)

(4) Where the licensee is a medical man employed as manager by the proprietor of the house his licence will be transferable or renewable to him so long as he continues manager or to the proprietor or to any other medical manager employed by the proprietor (*m*)

**Residence of  
licensee**

A licence must not be granted unless the licensee or one of the licensees undertakes to reside in the house (*n*) A licence to several persons, one of whom dies before the expiration of the licence, will remain in force provided one of the survivors has undertaken, or undertakes within ten days after the death to reside on the licensed premises (*o*)

**Inspection  
prior to  
licence**

**983** Before a house not within the immediate jurisdiction of the Commissioners (*p*) and not previously licensed is licensed one or more of the Commissioners must by inspection ascertain whether the house is suitable for the reception of lunatics and the Commissioners must report thereon to the clerk of the peace of the county or borough and the report must be received and considered by the justices (*q*)

**Alteration in  
premises**

**984** No alteration or addition must be made to any licensed house without the previous consent in writing of the Commissioners and also of two of the visitors in the case of a house within the jurisdiction of visitors (*r*)

**Transfer of  
licence on  
incapacity or  
death of  
licensee.**

**985** If a licensee becomes by sickness or other sufficient reason incapable of keeping the licensed house or dies before the expiration of the licence, the Commissioners or any three justices for the county or borough as the case be may transfer the licence for the term then unexpired, to such person as they approve (*s*)

**Revocation of  
licence**

**986** If a majority of the justices of a county or quarter sessions borough or the Commissioners recommend to the Lord Chancellor that any licence be revoked or be not renewed the Lord Chancellor may revoke or prohibit the renewal of the licence (*t*)

on whose petition the reception order of each private patient was made or to the person by whom the last payment on account of the patient was made and to the authority liable for the maintenance of each pauper patient (1 unacy Act 1890 (53 & 54 Vict c 5) s 219) As to reception orders see pp 499 *et seq post*

(*l*) *Ibid* s 207 (4)

(*m*) *Ibid* s 201 (5)

(*n*) *Ibid* s 211

(*o*) *Ibid* s 212

(*p*) For places within the immediate jurisdiction see note (e) p 466 *ante*

(*q*) 1 unacy Act 1890 (53 & 54 Vict c 5) s 210

(*r*) *Ibid* s 213

(*s*) *Ibid* s 218 (1) Where the licence is transferred by justices the clerk of the peace must within three days of the date of the instrument of transfer (under a penalty of 40s for each day he is in default) send a copy thereof to the Commissioners (*ibid*, s 218 (2) (3))

(*t*) 1 unacy Act, 1890 (53 & 54 Vict c 5) s 221 (1) To give gratuities to relieving officers for pauper lunatics brought to a licensed house renders the licensee liable to revocation (Commissioners 59th Report p 50) Notice must be given to the manager of the licensed house seven clear days before the application

**987** The Commissioners, with the sanction of a Secretary of State, may make regulations for the government of licensed houses, which regulations, or a copy whereof, must be sent to every licensed house to which they relate and must be observed therein (a)

**988** In a house licensed for one hundred patients there must be a resident medical practitioner as manager and medical officer (b),

A medical practitioner must visit

(a) Houses licensed for less than one hundred and more than fifty patients daily (c)

(b) Houses licensed for less than fifty patients, twice a week (d)

(c) Houses licensed for less than eleven patients twice a week or at such greater intervals as directed by the commissioners or visitors but not at greater intervals than once a fortnight (e)

There is power for the visitors or Commissioners to direct visits at other times not oftener than once a day (f)

**989** With the previous consent (g) in writing of two Commissioners (h) or where the house is licensed by justices of two justices voluntary boarders (i) may be received in a licensed house for the time mentioned in the consent, at the expiration of which period or of any extension thereof by a further consent, the boarder must be discharged (k). In addition the boarder must be allowed to leave the licensed house upon giving to the manager twenty four hours previous notice in writing of his intention so to do (l)

Admission of  
voluntary  
boarders

for revocation is made to the Lord Chancellor (Lunacy Act 1890 (33 & 34 Vict c 5) s 221 (4)). A copy or notice of the revocation is sent to the manager of the licensed house and then published in the *London Gazette* (*ibid* s 221 (3)) and such revocation takes effect not more than two months after publication in the *Gazette* (*ibid* s 221 (2)). To detain two or more lunatics in a house for more than two months after the expiration or revocation of the licence for the house is a misdemeanour (*ibid* s 222). For the penalty see p 528 *post*. But all powers of Commissioners and visitors with reference to licensed houses and the patients therein continue in force so long as there are any patients there (Lunacy Act 1890 (33 & 34 Vict c 5) s 223).

(a) *ibid* s 226. The Commissioners have made these regulations in their Rules dated the 26th June 1895

b) Lunacy Act 1890 (33 & 34 Vict c 5) s 228 (1).

c) *ibid* s 228 (2)

d) *ibid* s 228 (3)

e) *ibid* s 228 (3) (v)

f) *ibid* s 228 (4)

(g) This consent will only be given upon the application of the intending boarder (Lunacy Act, 1890 (33 & 34 Vict c 5) s 229 (2))

(h) If the house is not within the immediate jurisdiction of the Commissioners (see note (e) p 466 *ante*) notice of reception must be given to them by the manager within twenty four hours of reception under a penalty of £5 for each day he is in default (Lunacy Act 1891 (54 & 55 Vict c 60) s 20)

(i) Any relative or friend of the boarder may also be received on the same terms (*ibid* s 229 (1)). But the total number of patients and boarders must not exceed the number of patients for which the house is licensed (*ibid* s 229 (3)) and each boarder must, if required be produced to the Commissioners or visitors on their visits (*ibid* s 229 (4))

(k) *ibid* s 229 (1)

(l) *ibid* s 229 (5). Failure to allow the boarder to leave renders the



## SECT 4

## SUB SECT 2—Hospitals

**Licensed Houses and Hospitals****Definition****Medical officer****Registration****Inspection prior to registration  
Provisional certificate****Approval of regulations  
Complete certificate****Information which may be required by the Commissioners**

**990** 'Hospital means in the Lunacy Acts (*m*) any hospital or part of a hospital, or other house or institution (not being an asylum) wherein lunatics are received and supported wholly or partly by voluntary contributions or by any charitable bequest or gift or by applying the excess of payments of some patients towards the support, provision or benefit of other patients (*n*) Every hospital must have a resident medical practitioner as superintendent and medical officer (*o*) and no lunatic must be received in any hospital unless it is registered (*p*)

**991** When application is made for the registration of a hospital (*q*) for the reception of lunatics the Commissioners inspect the hospital (*r*) If they consider that the hospital ought not to be registered they must so report to a Secretary of State who must thereupon finally determine the matter (*s*) If the Commissioners are of opinion or a Secretary of State determines that the hospital ought to be registered the Commissioners issue a provisional certificate of registration valid for six months or any extended time (*t*)

Within three months from the grant of the provisional certificate the managing committee of the hospital must submit regulations to the hospital to a Secretary of State and on his approval the Commissioners issue a complete certificate of registration specifying the number of patients of each sex to be received (*u*)

**992** The Commissioners may require from the superintendent or officers of a registered hospital information as to the mode in

manager liable for an action for £10 as liquidated damages for each day or part of a day of improper detention (Lunacy Act 1890 (53 & 54 Vict c 5) s 229 (6)) If the Commissioners consider any boarder unfit to remain as a boarder they may direct the manager to remove him or to take steps to obtain a reception order and failure to comply with such direction involves a penalty of £1 for each day's default (Lunacy Act 1891 (54 & 55 Vict c 65) s 20)

(*m*) *I* or these see note (*l*) p 412 *ante*

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 341 as to the meaning of asylum see note (*l*) p 419 *post*

(*o*) Lunacy Act 1890 (53 & 54 Vict c 5) s 230

(*p*) *Ibid* s 231 (9)

(*q*) Only the buildings shown on the plans sent to the Commissioners pursuant to their rules will be considered as part of the hospital for the purpose of the reception of lunatics and knowingly to lodge patients in any building not shown on such plans is a misdemeanour (*ibid* s 233) For the penalty see p 226 *post*

(*r*) Lunacy Act 1890 (53 & 54 Vict c 5) s 231 (1)

(*s*) *Ibid* s 231 (2)

(*t*) *Ibid* s 231 (3) (4)

(*u*) *Ibid* s 231 (5) (6) This number will cover boarders as well as patients (*ibid* s 231 (8)) Non observance of the terms of the certificate of registration or of the statutory provisions as to hospitals by the superintendent constitutes a misdemeanour (*ibid* s 231 (10)) The regulations which may with the approval of a Secretary of State be altered (Lunacy Act 1891 (54 & 55 Vict c 65) s 12) must be printed and a copy sent to the Commissioners and another copy hung in the visitors room in the hospital under penalty of £20 (Lunacy Act 1890 (53 & 54 Vict c 5) s 232 (2) (3)) The hospital accounts unless submitted to the Charity Commissioners must be audited once a year by an accountant or other auditor approved by the Lunacy Commissioners and must be printed (*ibid*, s 234)

which the hospital regulations are carried out (a) and if dissatisfied they may give notice to the superintendent and two members of the managing committee (b) requiring that such regulations shall be observed (c)

SECT 4  
Licensed  
Houses and  
Hospitals

On non observance for six months of the requirements of the notice the Commissioners, with the consent in writing of a Secretary of State may make an order (d) closing the hospital for the reception of lunatics (e)

Order for  
closing  
hospital

**993** If complaints are made by persons resident in the neighbourhood of any hospital that the patients are allowed to go outside the hospital without sufficient or any control the Commissioners may inquire and may make orders in relation thereto and the superintendent of any hospital disobeying any such order is guilty of a misdemeanour (f)

Complaints  
by residents  
in neighbourhood

**994** The managing committee of any hospital may grant to any officer or servant who is incapacitated or who has been in the hospital for fifteen years and is not less than fifty years old a superannuation allowance up to two thirds of his salary with the value of the lodgings rations or other allowances enjoyed by him as the committee think fit (g)

Superannua-  
tion allow-  
ances

## SECT 5 — County and Borough Asylums

### SUB SECT 1 — Duty of Local Authority

**995** Every local authority (h) acting through a visiting committee (i) must provide and maintain asylum (l) accommodation

Accommoda-  
tion required.

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 23 (1)

(b) Any medical or other officer of the hospital is disqualified from being on the managing committee as also is anyone interested in a contract with the managing committee (*ibid* s 236)

(c) *Ibid* s 231 (2)

(d) Before the order is made the superintendent and managing committee will be given fourteen days to state their reasons for non compliance with the original notice and their statement must be laid before the Secretary of State (*ibid* s 231 (3))

(e) *Ibid* s 231 (3) To detain lunatics after this order has been made is a misdemeanour (*ibid* s 237 (4)) For the penalty see p 521 *post*

(f) Lunacy Act 1891 (54 & 55 Vict c 5) s 21 This clause was introduced into the Act in the House of Lords The Commissioners state that they would be very reluctant to make any order thereunder as the proper execution of patients is part of their treatment to which the Commissioners attach great importance (Commissioners 46th Report p 84)

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 235

(h) The council of every administrative county and county, borough respectively constituted under the Local Government Act 1888 (51 & 52 Vict c 41) and the council of each of the boroughs specified in the Lunacy Act 1890 (53 & 54 Vict c 5) Sched IV or in the case of the City of London the Common Council is a local authority for the purposes of such last mentioned Act (*ibid* s 240)

Special provision has been made with regard to Lancashire by the Lancashire County (Lunatic Asylums and other Powers) Act 1891 (54 & 55 Vict c 22) by which a board is constituted consisting of representatives of the county council and fifteen county boroughs in which are vested the county asylums with powers of management

(i) Lunacy Act 1890 (53 & 54 Vict c 5) s 239

(l) Asylum means in the Lunacy Acts an asylum for lunatics provided

**SECT 5**  
**County and**  
**Borough**  
**Asylums**

Failure in  
duty of local  
authority

for pauper lunatics (*l*) and may provide asylum accommodation for pauper and private patients together, or in separate asylums and may provide separate asylums for idiots or patients suffering from any particular class of mental disorder (*m*) Any such provision may be made by the local authority, either alone or by uniting with some other local authority or authorities (*n*) If the Commissioners report to the Secretary of State that any local authority (*o*) has failed to satisfy the statutory requirements as regards asylum accommodation the Secretary of State may require the local authority to provide such accommodation (*p*)

**SUB SECT 2 — Provision of Asylums**

Purchase and  
furnishing of  
buildings

**996** A visiting committee authorised to provide asylum accommodation may agree upon plans and estimates and contract (*g*) for the purchase of lands and buildings (*o*), with or without fittings and furniture, and for the erection, restoration and enlargement of buildings (*s*) (which plans and contracts must be approved by a

by a county or borough or by a union of counties or boroughs (Lunacy Act 1890 (53 & 54 Vict c 5) s 341) When no more patients can be accommodated in the county asylums it is the duty of the county council to provide the additional accommodation either by building another asylum or by making arrangements for the reception of county patients in some other asylum or institution for lunatics

(*l*) *Ibid* s 238 (1)

(*m*) *Ibid* s 241

(*n*) *Ibid* s 242 (1) see further as to such agreements note (*b*) p 484 *post* Lunacy Act 1890 (53 & 54 Vict c 5) s 29 (2) (3) A local authority which is not a county council has for the purpose of providing asylum accommodation all the powers conferred on a county council by the Local Government Act 1888 (51 & 52 Vict c 41) s 65 (Lunacy Act 1890 (53 & 54 Vict c 5) s 238 (4))

(*p*) *Ibid* s 247 The remedy for breach of the above statutory duty is by mandamus to the authority at the instance of the Secretary of State Even if special damage is suffered through the failure to provide sufficient accommodation an action will not lie for the recovery of such special damage As to procedure by mandamus see title CROWN PRACTICE Vol. X pp 77 *et seq*

(*g*) All plans estimates and contracts and the amount to be paid by each local authority must be reported by the visiting committees to their local authorities in any event and must also be approved by such local authorities unless the amount to be expended has been previously sanctioned by them (Lunacy Act 1890 (53 & 54 Vict c 5) s 204 (3)) A contract need not be approved before signature (*Devenish v Brown* (1896) 26 L J (CH) 23) In case of difference between the local authorities the authority withholding approval to any plan estimate or contract must within four months after the same has been reported to it send to a Secretary of State a statement of its objections and the Secretary of State may direct the work to be carried out with or without alterations or may direct an alternative scheme and his decision is final (Lunacy Act 1890 (53 & 54 Vict c 5) s 204 (4))

(*r*) The Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION Vol VI pp 1 *et seq*) (not including the provisions as to compulsory purchase sale of superfluous land and recovery of penalties etc) are incorporated with the Lunacy Act 1890 (53 & 54 Vict c 5) (*ibid* s 260) so limited owners can sell (*Devenish v Brown supra*) The power to purchase compulsorily may, however be exercised subject to certain restrictions under the Local Government Act 1888 (51 & 52 Vict c 41) s 60 Power is also given to a local authority to purchase any licensed or other houses and land (Lunacy Act 1890 (53 Vict c 5) s 238 (3))

(*s*) The Commissioners say they view with concern a growing tendency to

Secretary of State before being carried into effect), and also for the furnishing of buildings and for the supply of clothing, and for all the matters necessary (a) for carrying into effect the authority conferred upon them (b)

**SECT 5**  
**County and**  
**Borough**  
**Asylums**

Contractor to  
give security

Every person entering into a contract with a visiting committee must give sufficient security for due performance of the contract (c) and every contract, and all orders relating to it, must be entered in a book kept by the clerk to the visiting committee and when the contract is completed the book must be deposited with the local authority, or where there are several authorities with that which contributes the largest proportion of the expenses of the contract (d)

**997** Where any lands contracted to be purchased or taken in exchange by a visiting committee are found unsuitable or are not required the committee may, with the consent of a Secretary of State and upon payment of such sum, if any, as he approves, procure a release from the contract (e)

Release from  
contract

**998** Instead of purchasing land or buildings a visiting committee may take a lease thereof for not less than sixty years (f) and, with the sanction of their local authority may hire or become yearly tenants or tenants for a term of years of any land or buildings (g) for the employment of asylum patients or the temporary accommodation of pauper lunatics for whom the asylum accommodation is inadequate (h)

Lease instead  
of purchase

**999** Lands acquired for the purposes of the Lunacy Act 1890 (i), may be conveyed (1) to the local authority being a county council, (2) if such authority is a borough council to the municipal corporation of the borough and (3) where more than one local authority is interested, to all local authorities interested as joint tenants (k)

To whom land  
is conveyed

**1000** Lands and buildings used for asylum purposes and afterwards found unsuitable or not required, may with the consent of a

Appropriation  
of land not  
required for  
asylum  
purposes.

extravagance in building asylums and have issued a circular urging the need of strict economy in the building finishing fitting and furnishing of asylums (55th Report p 11) They have also issued (September 1911) instructions relating to the sites and construction of lunatic asylums

(a) As to what is reasonably necessary see *Moffatt v Duhson* (1853) 13 O B 543

(b) Lunacy Act 1890 (53 & 54 Vict c 5) s 204 (1) (2) Lunacy Act 1891 (54 & 55 Vict c 65) s 16

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 206 (1)

(d) *Ibid* s 256 (2) This book may be inspected by ratepayers (*ibid* s 256 (3)) and a copy thereof must be kept at the asylum to which the contract relates (*ibid* s 256 (4))

(e) *Ibid* s 268 (1) The consideration for the release and the expenses of the contract and release are raised in the same manner as if the same were payable in respect of the purchase money of lands for the purposes aforesaid (*ibid* s 268 (2))

(f) *Ibid* s 261 (1)

(g) Such land and buildings are deemed part of the asylum and subject to all the existing asylum provisions (*ibid*, s 261 (3))

(h) *Ibid* s 261 (2)

(i) 53 & 54 Vict c 5

(k) *Ibid* s 264

**SECT 5**  
**County and**  
**Borough**  
**Asylums.**

Supplying  
deficiency in  
accommoda-  
tion

Private  
patients

Consents  
required

Orders for  
repairs

Burial of  
patients and  
officers

Secretary of State and subject to such conditions as he may impose, be retained and appropriated for any purposes for which the local authority is empowered to acquire land (*l*)

**1001** When asylum accommodation appears to be insufficient, the local authority may supply the deficiency by exercising its powers in regard to providing accommodation or by rebuilding or enlarging any existing asylum (*m*)

For the purpose of providing accommodation for private lunatics the visiting committee of an asylum may with the consent of each local authority by whom the asylum is provided and with the approval in writing of a Secretary of State, make alterations in or additions to the asylum (*n*)

A district asylum must not be enlarged or improved without the consent of all the parties to the agreement under which the same is provided (*o*)

The visiting committee of an asylum may of their own authority order (*p*) all necessary and ordinary repairs and also all necessary and proper additions alterations and improvements to an amount not exceeding £400 in any one year (*q*)

**1002** The visiting committee may with the consent of their local authority and of a Secretary of State arrange for the burial of lunatics dying in their asylum and of their officers and servants by (*inter alia*) providing burial grounds, enlarging existing burial grounds or agreeing with persons willing to provide for such burial (*r*)

(*l*) Lunacy Act 1890 (53 & 54 Vict c 5) s 265

(*m*) *Ibid* s 238 (2)

(*n*) *Ibid* s 205

(*o*) *Ibid* s 207

(*p*) An order for payment of the cost incurred may be made on the treasurer of the authority or of each authority liable for payment and the treasurer must pay the amount mentioned in the order out of the county or borough fund (*ibid* s 266 (5)) The obligation of the visiting committee to make orders for payment appears to be enforceable by mandamus and the obligation of the treasurer of the local authority to pay on the order made by the visiting committee not by mandamus but by action see *Re Richmond (as to) and Richmond (Surrey) Corporation* [1895] 1 Q B 56 and *L v London and North Western Railway and Great Western Railway* (1896) 65 J J (Q. B.) 116

(*q*) Lunacy Act 1890 (53 & 54 Vict c 5) s 266 (1) An order for any of such works exceeding £100 must be signed by at least three visitors at a meeting of the visiting committee summoned for consideration of the matter (*ibid* s 266 (2)) Expenditure except for repairs must be reported to the local authority liable therefor (*ibid* s 266 (3)) In the case of a district asylum the visiting committee must apportion the expenses in the proportion in which the local authorities have contributed to the erection of the asylum or where the agreement to unite deals with the proportions then in accordance with such agreement and if the agreement deals only with repairs then the additions alterations and improvements must be borne in the same proportion as the repairs (*ibid*, s. 266 (4))

(*r*) *Ibid* ss. 258 209 See title BURIAL AND CREMATION Vol III p 545 As to what burial fees are payable on the burial of a lunatic, see *Wood v Headingley cum-Burley Burial Board* [1892] 1 Q B 713, and *Williams v Bristol Ferry Burial Board*, [1905] 2 K B 569

## SUB SECT 3 — Rules and Officers of Asylums

## SECT 5

County and  
Borough  
AsylumsApproval of  
rules  
Regulations as  
to officers

Officers

**1003** The visiting committee of an asylum must within twelve months after its completion submit to a Secretary of State rules for the government of the asylum and such rules when approved by a Secretary of State must be printed and observed (a) The visiting committee must also make regulations as to the number and description of officers and servants and their respective duties and salaries (t) and must determine the diet of the patients (a)

**1004** The visiting committee must appoint —

(1) A chaplain (b) (2) a medical officer (c), (3) a superintendent or if there is more than one division a superintendent of each division of the asylum who must be the resident medical officer of the asylum or of the division of which he is appointed superintendent unless a Secretary of State authorises the committee to appoint some other person than a medical officer to be superintendent (4) a clerk (5) a treasurer (6) such other officers and servants as they think fit (d)

Appointees may be removed and vacancies in the above mentioned posts (1) to (5) must and in the posts referred to in (6) may, be filled by the committee (e) who also fix the salaries, wages and remuneration of every person appointed (f)

(a) Lunacy Act 1890 (33 & 34 Vict c 5) s 210 (1). The rules may be altered and varied with the approval of a Secretary of State (*ibid* s 210 (2)).

(t) *Ibid* s 210 (u). The regulations may provide that any number of beds may be reserved for specified cases and in that event the asylum will be considered full for non specified cases when there are no vacant beds except those so specially reserved but the committee may if they think fit fill any reserved beds (*ibid* s 210 (4)). The regulations may also provide for the exclusion of contagious or infectious maladies or of those coming from a place where such a malady is prevalent (*ibid* s 210 (u)). But this will not enable the committee to require the guardians to furnish certificate that the patient is free from certain specified infectious maladies. The regulations may also provide for the absence for a period not exceeding four days of a patient from the asylum by permission of the manager (*ibid* s 210 (5)).

(a) *Ibid* s 215 (6).

(b) See title ECCLESIASTICAL LAW Vol XI p 650. The chaplain is not compelled by statute to reside in the asylum or to give his whole time to the duties of his office therein (*J v Hereford County Council* (1890) 35 W R 177) but the committee may reasonably appropriate a house for him within the asylum premises and require him to reside there (*Congreve v Upton Overseers* (1864) 4 B & S 851). A minister of any religious persuasion may be appointed to attend patients of the same religion as himself (Lunacy Act 1890 (33 & 34 Vict c 5) s 276 (2)) and one not so appointed and not belonging to the Established Church may at the request of a patient of the same religion as himself or at the request of the patient's friends be authorised to visit the patient subject to such regulations as the medical officer approves (*ibid* s 271 (3)).

(c) He must reside in the asylum and must not be the clerk or treasurer thereof (*ibid* s 276 (1) (b)). Residence in the asylum means that the doctor's house must be in the grounds appropriated to the asylum so as to be reasonably within it (*Congreve v Upton Overseers supra*). A visiting physician or surgeon may also be appointed by the committee (Lunacy Act 1890 (33 & 34 Vict c 5) s 216 (4)).

(d) *Ibid* s 216 (1) (c) (d) (e) (f).

(e) *Ibid* s 276 (3).

(f) *Ibid* s 276 (5). Provision has been made by the Asylum Officers' Superannuation Act 1909 (9 Edw 7 c 48), for gratuities and superannuation allowances to officers and servants of asylums who are for this purpose divided

**SECT 5**  
**County and**  
**Borough**  
**Asylums**

Duty of  
officers to  
keep books  
etc

Agreements  
to unite

**1005** The clerk to the asylum must keep all books and documents which the visiting committee are required to keep (*g*) and an account of receipts and expenditure on account of the asylum (*h*), and the treasurer and every officer of the asylum who receives or expends money or goods on the account of the asylum must keep accounts of his receipts and expenditure (*a*)

**SUB SECT 4**—*Agreements to unite Contributions and (Contracts for Reception of Pauper Lunatics*

**1006** Local authorities may unite either jointly to provide and maintain a district asylum or upon terms as to payment, for the joint use as a district asylum of an existing asylum

Agreements to unite (*b*) must state—

(1) The number of visitors to be chosen by each contracting

into two classes (Asylum Officers Superannuation Act 1909 (9 Edw 7 c 48) s 1) those having charge of patients and other officers or servants. The ordinary allowance is one fiftieth or one sixtieth of the salary (according to class) for each year of service with power to the visiting committee to increase it in special cases to an amount not exceeding two thirds of the salary while no gratuity can exceed one years salary (*ibid* s 2). Allowances are not assignable and may be applied by the visiting committee in repayment of parochial relief received by the officer or otherwise for his support or for the benefit of those dependent on him (*ibid* s 14). Provision is also made for the granting of gratuities to dependants in case of the death of an officer or servant (*ibid* s 4) and the forfeiture by any officer or servant who is guilty of any offence of a fraudulent character or of grave misconduct of all claim to any superannuation allowance (*ibid* s 5) for contribution by officers and servants annually of a percentage amount of their salaries towards a superannuation fund (*ibid* ss 8 9) and also for the return of such contributions in certain cases to officers or servants who have not become entitled to a superannuation allowance (*ibid* s 10).

(*g*) Lunacy Act 1890 (53 & 54 Vict c 5) s 278 (1)

(*h*) *ibid* s 278 (2) Before the 30th September in each year or at such other date as the Local Government Board appoint the clerk must send to the Local Government Board and to the Commissioners (*ibid* s 218 (3)) an abstract of the previous year containing such particulars and in such form as the Local Government Board direct (*ibid* s 218 (4)) and a copy of this abstract must within one month of its receipt be laid before both Houses of Parliament if then sitting (*ibid* s 278 (2)). The provisions of the Local Government Act 1888 (51 & 22 Vict c 41) relating to the accounts of the county councils and their officers and to the audit of such accounts will apply to every asylum belonging wholly or in part to a county council and to the visiting committee and officers thereof (Lunacy Act 1891 (54 & 55 Vict c 65) s 18) See title LOCAL GOVERNMENT p 362 *ante*

(*a*) Lunacy Act 1890 (53 & 54 Vict c 5) s 278 (6)

(*b*) Agreements to unite require the approval of a Secretary of State (*ibid* s 242 (3)). As to obtaining such approval see *ibid* s 272. For form of agreement see *ibid* Sched II Form 21. The agreement may with the consent in writing of a majority of visitors of each contracting party and of the Secretary of State be altered or varied but not so as to contain provisions which could not originally have been included in it (*ibid* s 250). An agreement to unite must be reported as soon as possible to the local authorities interested (*ibid* s 251 (1)) and the original must be delivered to the clerk of the authority within whose administrative area the asylum is situate to be kept by him among the records of the local authority (*ibid* s 251 (2)). The original may be inspected by any commissioner or member of the council of the contracting authorities without payment (*ibid* s 251 (3)) and the clerk must within twenty days make and send one copy to each of the contracting local authorities (*ibid* s 251 (4)). As to provisions relating to the acquisition of land and furnishing of asylums by local authorities see pp 480 *et seq* *ante*. For a form of clause relating to lunatic asylums in an agreement to unite contributions see *Encyclopedia of Forms and Precedents* Vol XVI pp 362 363

party (2) the proportion in which the expenses of providing the asylum are to be borne by each contracting party (c) and the basis upon which such proportion is fixed, (3) where the agreement provides for the joint user of an existing asylum the sum to be paid by each contracting party towards expenses already incurred (d) Provisions subjecting the visiting committee (e) to any control not provided by the Lunacy Act 1890 (f), except the control of a Secretary of State are invalid (g)

SECT 5  
County and  
Borough  
Asylums

**1007** A visiting committee with the consent of a Secretary of State may by resolution passed by a majority of the whole number of the members of the committee at a meeting summoned upon notice for that purpose dissolve an agreement to unite (h) But before the dissolution takes effect every local authority interested under the agreement to unite must elect a committee to provide asylum accommodation (i)

Dissolution

**1008** Where a county borough has contributed to the cost of building and furnishing a county asylum the existing liability of the borough council continues until a new arrangement is made (l) and the county council must provide accommodation and

Liability of  
borough  
council after  
contribution  
by county  
borough

(c) This proportion may be fixed either according to the extent of the accommodation required for each county and borough or in proportion to the respective population of each county and borough according to the last census (Lunacy Act 1890 (53 & 54 Vict c 5) s 249)

(d) Such sum is paid to the treasurer of the local authority entitled thereto as part of the county or borough fund and must be applied to the purpose for which capital is properly applicable (*ibid* s 252) For a form of clause providing for contribution see *Encyclopædia of Forms and Precedents* Vol. XVI pp 362-363

(e) As soon as the agreement has been reported each local authority must elect its number of visitors authorised by the agreement and such visitors must carry the agreement into effect and are the visiting committee of the asylum until the election of a visiting committee in their place (Lunacy Act 1890 (53 & 54 Vict c 5) s 253) As to the annual election of a visiting committee see p 467 *ante*

(f) 53 & 54 Vict c 5

(g) *Ibid* s 248

(h) *Ibid* s 267 (1) In case of a dissolution between authorities one of whom having no asylum of its own makes an annual fixed payment to the other authority for the use of the latter's asylum the paying authority may raise such a sum for compensation to the receiving authority as the visiting committee who dissolve the union approve (*ibid* s 261 (3)) The visiting committee may divide the real and personal property held under the agreement to unite amongst the local authorities in the proportions in which they contributed thereto or in such other proportions as a Secretary of State may approve and such sum as may be approved by a Secretary of State may be awarded to any local authority instead of a share of the property (*ibid* s 261 (4))

(i) *Ibid* s 261 (2)

(k) A refusal to agree to a new arrangement or an adjustment of property debts and liabilities on the making of such new arrangement (*ibid* s 241 (2)) or any question as to the asylums or the maintenance of the lunatics may be referred to an arbitrator chosen by the parties or in default of agreement by the Local Government Board (Lunacy Act 1891 (54 & 55 Vict c 65) s 14) and sums ordered to be paid by way of adjustment may be raised out of the borough funds as provided by the Local Government Act 1891 (54 & 55 Vict c 65) s 41 s 62 (5) (6) (7) (Lunacy Act 1891 (54 & 55 Vict c 65) s 15) All costs consequent upon a new arrangement or the termination of the old contract must be borne by the council of the borough upon whom is cast the duty of providing an asylum for the reception of lunatics



**SECT 5**  
**County and**  
**Borough**  
**Asylums**

Contract for  
reception of  
pauper  
lunatics from  
county  
borough

Contributions  
and contracts  
by boroughs  
specified in  
Lunacy Act  
1890  
Sched IV

Contract by  
visiting com-  
mittee with  
manager of  
licensed house

maintain pauper lunatics sent from the borough on the same terms as before (*l*)

**1009** The council of a county borough may contract with the visiting committee of an asylum for the reception of the pauper lunatics of the borough into the asylum (*m*) upon terms to be agreed between the parties (*n*). The contract must be approved by a Secretary of State (*o*) and while it is in force the council of the borough will not be required to provide an asylum alone or in union (*p*).

Where any borough specified in Schedule IV (*r*) to the Lunacy Act, 1890 (*q*) contributes to a county asylum such borough, so long as it continues to contribute is deemed to satisfy the statutory requirements with respect to asylum accommodation (*r*). In the alternative the borough council may resolve for the purpose of providing asylum accommodation to separate from the county to which it contributes (*s*).

Where any such borough (*t*) has contracted for the reception of its lunatics in the asylum of the county in which the borough is situate the borough on the determination of the contract, ceases to be a local authority under the Lunacy Act 1890 (*q*), and is liable to contribute to the county rate of the county in respect of such lunatic asylum in like manner as the rest of the county (*u*).

**1010** A visiting committee may contract (*a*) with the manager of a licensed house for the reception therein of all or any of the

(*l*) Lunacy Act 1890 (33 & 34 Vict c 5) s 244 (1)

(*m*) *Ibid* s 243 (1)

(*n*) *Ibid* s 243 (2)

(*o*) *Ibid* s 243 (4)

(*p*) *Ibid* s 243 (3)

Where three boroughs agreed to pay an annual rent to the treasurer of the county lunatic asylum for the privilege of using the same it was held that the liability of the boroughs to provide for the maintenance management of and dealings with the joint asylum was not extinguished but was transferred under the Local Government Act 1888 (51 & 52 Vict c 41) s 38 (1) from the boroughs to the county council but subject to the existing contracts between the boroughs and the visiting justices of the asylum (*Re Salop County Council* (1891) 65 L T 416). For a form of agreement compare *Encyclopædia of Forms and Precedents* Vol XXI p 369. As to the termination of agreements, see note (*a*) *infra*.

(*q*) 33 & 34 Vict c 5

(*r*) Lunacy Act 1890 (33 & 34 Vict c 5) s 245 (1) and Sched IV, as amended by Lunacy Act 1891 (54 & 55 Vict c 65) s 29

(*s*) *Ibid* s 245 (2). Notice of the resolution to separate must be given to the clerk of the county council and six months after the date of such notice the borough council becomes subject to the statutory obligations to provide asylum accommodation (*ibid* s 245 (3)) and also continues liable to contribute to the county asylum so long as any of its pauper lunatics are therein (*ibid* s 245 (4)).

(*t*) See the text and note (*r*) *supra*

(*u*) Lunacy Act 1890 (53 & 54 Vict c 5) s 246. For a discussion on the above provision see *Hawlett v Maudstone Corporation* [1891] 2 Q B 110 O A. The borough will be treated as part of the county and if and so far as it has not contributed towards the expenses of providing the county asylum its indebtedness will be fixed by agreement or in default of agreement by an arbitrator appointed by the parties or if they cannot agree by the Local Government Board. In ascertaining the sum to be paid the borough must be credited with any sums already contributed for lunacy purposes in excess of its legal liability and consideration must also be given to amounts which the borough may have paid for the reception or maintenance of its lunatics in the county asylum (Lunacy Act, 1891 (54 & 55 Vict c 65), s 13 (1) see also *ibid* s 13 (2)).

(*a*) These contracts (hereinafter called reception contracts) must not be for

## PART VI — ADMINISTRATION

pauper lunatics of the local authority for whom the committee is acting or for the use and occupation of the whole or any part of the house. A visiting committee may also enter into a similar contract (b) for the reception of pauper lunatics with any other committee in respect of the latter's asylum (c).

### SECT 5 County and Borough Asylums

**1011** Where an asylum is more than sufficient for the pauper lunatics who for the time being can be lawfully received the visiting committee may by resolution permit any other pauper lunatics to be received in the asylum (d).

Accommodation of out county pauper lunatics.

**1012** Private patients may be received into any asylum upon such terms as to payment and accommodation as the visiting committee think fit and the conditions as to their reception and detention are the same as in the case of private patients received into hospitals or licensed houses (e).

Private patients.

more than five years but may be renewed (Lunacy Act 1890 (53 & 54 Vict c 5) s 269 (3)).

They cannot be carried into effect until approved by a Secretary of State and may be determined by him (*ibid* s 269 (5)). If made with the manager of a licensed house they determine on the house ceasing to be licensed (*ibid* s 269 (6)) see note (f) p 416 *ante*. A reception contract made on behalf of a borough with the visiting committee of an asylum and determinable by the parties can only be determined with the consent of a Secretary of State (*ibid* s 269 (4)). If a Secretary of State determines a reception contract liability for asylum accommodation attaches to the authority whose lunatics were received under the contract although the term specified therein has not expired (*ibid* s 269 (1)). The local authority liable under a reception contract defrays out of the county or borough fund so much of the weekly charge agreed upon for each pauper lunatic as in the opinion of the visiting committee represents the sum not exceeding one fourth of the entire weekly charge due for accommodation in exoneration to that extent of the union to which the maintenance of any such pauper lunatic is chargeable (*ibid* s 269 (9)). As to fixing the weekly charge see pp 458 *et seq* *post*.

(c) See note (a) p 456 *ante*. For a form of agreement see *Cyclopaedia of Forms and Precedents* Vol XVI p 369 and see also *ibid* p 13.

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 269 (1). Where a reception contract between a visiting committee and the subscribers to a hospital (see p 49 *ante*) or between the council of a borough and the hospital was subsisting on 26th August 1889 such contract continues in force and in the case of a contract entered into by the visiting committee on its expiration a new contract may be substituted whilst in the case of a contract entered into by the council of a borough such contract may be renewed subject to the same conditions and with the same consequences as if it had been entered into by a visiting committee on behalf of the borough (Lunacy Act 1890 (53 & 54 Vict c 5) s 269 (2)). Lunacy Act 1891 (54 & 55 Vict c 60) s 1. Except as before mentioned a visiting committee must not enter into a reception contract with subscribers to a hospital (Lunacy Act 1890 (53 & 54 Vict c 5) s 269 (8)). Where a reception contract has been entered into by the visiting committee of an asylum with the subscriber to a hospital or the manager of a licensed house the hospital or house may be visited by any member for the time being of the committee of the asylum (*ibid* s 269 (10)).

(e) *Ibid* s 270 (1). The resolution which may be rescinded or varied (*ibid* s 270 (3)) may require an undertaking from the guardians to whose union the lunatic is chargeable for payment of the expenses of his maintenance his burial if he dies in the asylum and his removal within six days after notice from the manager of the asylum (*ibid* s 270 (2)).

(f) *Ibid* s 271 (1). An account of the amount by which the sums charged for private patients exceeds the amount of the sums charged for pauper patients settled in any place which has contributed to provide the asylum must be made up to the last day of each year. Out of this ascertained amount such sums for building repairs, outgoings and expenses as the visiting committee think proper may be allowed and the surplus, if any must be paid to the

## SECT 5

SUB SECT 5—*Miscellaneous*County and  
Borough  
Asylums

**1013** Expenses to be paid by a local authority for the purposes of the Lunacy Act 1890 (f) must be paid by their treasurer out of the county or borough fund to the treasurer of the asylum to which the local authority is liable (g)

Payments by  
local  
authority

Asylum  
situated with  
out limits of  
local  
authority

**1014** When an asylum is situate without the limits of the administrative area of the local authority providing it, the council and justices of the county or borough to which the asylum belongs have full power and authority to act in the county or borough in which the asylum is situate so far as concerns the regulation thereof (h)

Assessment

**1015** Lands and buildings purchased or acquired for the purposes of any asylum and any additional building thereon will while used for those purposes be assessed to county parochial district and other rates on the same basis and to the same extent as other lands and buildings in the same parish or district (i)

Approval by  
Secretary of  
State and  
Commissioners

**1016** Where the approval of a Secretary of State to any agreement, contract or plan is necessary the document, together with an estimate of its probable cost must be submitted to both the Commissioners and the Secretary of State and the Commissioners must report to the Secretary of State, who may approve the agreement contract or plan with or without modification, or may refuse his approval (l)

SECT 6—*Expenses of Pauper Lunatics*SUB SECT 1—*Fixing the Charge for Maintenance etc*

Charge fixed  
by visiting  
committee

**1017** Every visiting committee must fix a weekly sum for the expenses of maintenance (l) and other expenses of each pauper

treasurer of the authority to which the asylum belongs or where the asylum belongs to several authorities to their respective treasurers in the proportions in which they contributed to the asylum and must be applied as part of the county or borough fund (Lunacy Act 1890 (53 & 54 Vict c 5) s 271 (2)). As to providing accommodation for private patients see *ibid* s 255 and p 482 *ante* (f) 53 & 54 Vict c 5

(g) *Ibid* s 213 The local authority may with the consent of the Local Government Board and subject to the provisions of the Local Government Act 1888 (51 & 52 Vict c 41) and the Municipal Corporations Act 1882 (45 & 46 Vict c 50) according as the same respectively are applicable to the local authority borrow on the security of the county or borough fund and [or] of any revenue of the local authority for the purpose of paying money payable under the Lunacy Act 1890 (53 & 54 Vict c 5) (*ibid* s 274 (1)). The Public Works Loans Commissioners may if they see fit make loans to the local authority on the above security and for the above mentioned purposes (*ibid* s 274 (2))

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 262

(i) *Ibid* s 263 As to decisions with reference to the principles on which asylums are rated and the law on the subject see title RATES AND RATING

(k) Lunacy Act 1890 (53 & 54 Vict c 5) s 212 *Ex post facto* consent by a Secretary of State is invariably refused however desirable the work may have been (see Commissioners 53rd Report pp 18 29 30 and 59th Report p 26) As to obtaining the approval of the Secretary of State and the Commissioners to plans see the instructions issued in September 1911 by the Commissioners relating to the sites and construction of lunatic asylums

(l) *I.e.* the reasonable charge of the lodging maintenance medicine clothing, and care of the lunatic (Lunacy Act 1890 (53 & 54 Vict c 5) s 287 (1))

lunatic (*m*) in the asylum (*n*) of such amount not exceeding 14s that the total of such weekly sums must be sufficient to defray such expenses, and also the salaries of the officers and attendants of the asylum and such weekly sum may from time to time be altered. If 14s a week is found insufficient the local authority may order the necessary addition to the weekly sum. Every such order must be signed by their clerk and published in a local newspaper (*o*).

SECT 6  
Expenses of  
Pauper  
Lunatics

A committee may fix a greater weekly sum not exceeding 14s to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs (*p*). Any excess created by the payment of such greater weekly sum may if the visiting committee think fit be paid over to a building and repair fund to be applied to the altering, repairing or improving the asylum (*q*) and the committee must submit annually to the local authority a detailed statement of such application (*r*).

Charge in  
respect of out  
county pauper  
lunatics

Where the visiting committee have more than one asylum under their control they may subject to any direction from the local authority provide for a uniform charge for maintenance of lunatics in the several asylums and for this purpose any surplus from one asylum may be applied to any deficit on another (*s*).

Uniform  
charge for  
several  
asylums

#### SUB SECT 2 —*Validity for Maintenance etc*

**1018** Whenever a justice directs a lunatic or alleged lunatic whether a pauper or not, to be examined by a medical practitioner under the provisions of the Lunacy Acts (*t*), he or any other justice having jurisdiction where the examination took place may order the guardians to pay such reasonable remuneration (*u*) to the

Medical  
examination

(*m*) The provisions set out in pp 488 *ante*—499 *post* as to expenses of pauper lunatics are applicable not only to lunatics received as paupers but to lunatics in institutions who become paupers (Lunacy Act 1890 (53 & 54 Vict c 65) s 22).

(*n*) The compound phrase "expenses of maintenance and other expenses of each pauper lunatic in the asylum" includes the payment of parochial and other rates charged on the buildings of a county asylum and payment thereof may lawfully be made out of the maintenance fund of the asylum (*R v Dolby* [1892] 2 Q B 301).

(*o*) Lunacy Act 1890 (53 & 54 Vict c 65) s 283 (1) (2). If the amount so fixed is found to be more than sufficient it seems that the unions contributing have no claim for repayment of any part (*Proctor v Cheshire County Council* [1892] 56 J P 532).

(*p*) This greater weekly sum not exceeding 14s is not an excess sum over and above the sum not exceeding 14s referred to in the Lunacy Act 1890 (53 & 54 Vict c 65) s 283 (1). A visiting committee have no power therefore to fix a greater weekly sum than 14s for out county paupers all they can do is to differentiate and charge less than 14s for home lunatics but a greater sum up to the 14s limit for out lunatics (*Fitch v Bermondsey Guardians* [1900] 1 K B 524 C A).

(*q*) If the committee do not utilise the excess in the way directed the local authority would seem to be able to claim the amount (*Proctor v Cheshire County Council supra*).

(*r*) Lunacy Act 1890 (53 & 54 Vict c 65) s 283 (3) (4).

(*s*) *Ibid* s 284.

(*t*) See note (2) p 412 *ante*.

(*u*) In an Irish case it was held that remuneration could only be made for professional services not for loss of the doctor's time (*R v Delvin Union Guardians* [1908] 2 I R 15).

**SECT 6** medical practitioner (i), and all other reasonable expenses of the examination and inquiry and of carrying out any order (w)

**Expenses of Pauper Lunatics**

Costs of order of removal

**1019** The costs of obtaining an order for the removal of a lunatic in a licensed house or hospital who becomes a pauper (x) and of his removal must be repaid to the manager by the authority liable for maintenance and any justice having jurisdiction where the hospital or house from which the lunatic was removed is situate has power to fix the amount and to order the repayment (y)

What union is deemed to be chargeable

**1020** Where a pauper lunatic is sent to an institution for lunatics, or where a lunatic in such an institution becomes a pauper (x) he is deemed to be chargeable to the union from which he was sent until it is established that he is settled in some other union or that it cannot be ascertained where he was settled and the manager must forthwith give notice to the authority liable for maintenance (z) that the lunatic has become destitute Every pauper lunatic chargeable to a union is while residing in an institution for lunatics deemed for purposes of settlement to be resident in the union to which he is chargeable (a)

Order on union for expenses of maintenance

**1021** The justice by whom any pauper lunatic is sent to an institution or any two justices of the county or borough in which the institution where any pauper lunatic is confined is situate or from any part of which any pauper has been sent or any two justices being visitors of such institution may order guardians to whose union the lunatic is chargeable to pay to the treasurer or manager of the institution the reasonable charges of the lodging maintenance, medicine clothing and cure (referred to as expenses of maintenance) of such lunatic (b) Such an order may be wholly or partly retrospective or prospective and is not subject to appeal (c)

(i) If the justice has authority to call in two medical practitioners (e g under the Lunacy Act 1890 (53 & 54 Vict c 5) s 13 (2) see p 486 *post*) he can properly order payment of their remuneration

(ii) Lunacy Act 1890 (53 & 54 Vict c 5) s 285

(x) See p 419 *post*

(y) Lunacy Act 1891 (54 & 55 Vict c 65) s 19 (2) In the case of refusal or neglect to pay such amounts can be recovered by distress or action under the Lunacy Act 1890 (53 & 54 Vict c 5) s 314 see p 492 *post*

(z) The council of each county must from time to time pay out of the county fund to the guardians of every poor law union or council of a borough wholly or partly in the county a sum equal to 4s a week for each pauper lunatic chargeable to the union or borough and maintained in an asylum registered hospital or licensed house for whom the net charge upon the guardians after deducting any amount received by them for the maintenance of such lunatic from any source other than local rates is equal to or exceeds 4s a week throughout the period of maintenance for which the sum is so paid (Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (f) (g)) As to the fund from which these payments are made see *ibid* s 24 (2) (e) As to the deduction from the cost of maintenance of and the right of a county council to recover sums received from a source other than local rates see *Calne Union v Wilts County Council*, [1911] 1 K. B. 71.

(a) Lunacy Act, 1890 (53 & 54 Vict c 5) s 286

(b) In fixing the amount of these charges justices are not restricted to the limit of 14s per week (see p 489 *ante*) imposed by the Lunacy Act 1890 (53 & 54 Vict c 5) s 283 (*Glamorgan County Asylum (Committee of Visitors) v Cardiff Guardians* [1911] 1 K. B. 43; O A overruling the *dictum* of WRIGHT J in *Suffolk County Lunatic Asylum v Stow Union Guardians* (1897) 76 L. T. 494)

(c) Lunacy Act, 1890 (53 & 54 Vict. c. 5) s 287 Orders made under this provision will be rightly made *ex parte* (*R v Bruce*, [1892] 2 Q. B. 136) The

**1022** Orders for payment of expenses may be made by justices upon guardians although the union is not within such justices jurisdiction. Guardians of any union may obtain orders as to settlement or chargeability and payment of expenses of pauper lunatics (*d*). Orders for future maintenance will extend to expenses incurred in any institution where for the time being the lunatic is confined (*e*).

SECT 6  
Expenses of  
Pauper  
Lunatics

Nature of  
orders

**1023** All incidental expenses and maintenance of a lunatic removed to an institution who would at the time (*f*) of his removal have been exempt from removal to the parish of his settlement or country of his birth by reason of some provision of the Poor Removal Act 1846 (*g*) as amended must be paid by guardians of the union wherein the lunatic has acquired such exemption and no order (*h*) must be made in respect of such lunatic upon the guardians of the union wherein the lunatic is settled while the above mentioned expenses are to be paid and charged in this way (*i*).

Liability of  
union wherein  
lunatic has  
acquired  
exemption  
from removal

**1024** The necessary expenses attending the removal discharge or burial of a pauper lunatic in an institution must be borne by the union to which he is chargeable or the local authority liable for maintenance and must be paid by the guardians or the treasurer of the local authority (*j*).

Expenses of  
removal  
discharge or  
burial

**1025** The liability of any relation or person to maintain any lunatic is not taken away or affected where the lunatic is confined

Liability of  
relatives etc

substantive order is not subject to appeal but the refusal to make an order can be appealed from see p 494 *post*. As to why no appeal is given see *H v Northampton (Revised)* (1860) 6 B & S 605 *per* COCKBURN (J) at pp 660 661 *R v Bruce* [1892] 2 Q B 136 *per* WRIGHT J. Notwithstanding that the order is not subject to appeal where an action is brought to enforce the order the defendants are entitled to plead and defend (*Suffolk County Lunatic Asylum v Stow Union Guardians* (1897) 16 I T 491).

(*d*) Lunacy Act 1890 (53 & 54 Vict c 5) s 292

(*e*) *Ibid* s 293

(*f*) The time of the removal determines the liability. If irremovability has been acquired subsequent loss of that status is immaterial (*R v St Charles in the Fields Overseers* (1860) 30 L J (M C) 13; *Thame Union Guardians v Hands worth Union Guardians* (1871) 36 J P 161).

(*g*) 9 & 10 Vict c 66 as amended by the Poor Law Amendment Act 1819 (12 & 13 Vict c 103) s 4. Poor Removal Act 1861 (24 & 25 Vict c 50) and Union Chargeability Act 1865 (28 & 29 Vict c 49). See title POOR LAW.

(*h*) When the lunatic cannot be removed to the parish of his settlement or the country of his birth the expenses are thrown upon the union in which he has a status of irremovability and the justices may make an order on the guardians of that union for the payment of such expenses (*Leeds Guardians v Wakefield Guardians* (1857) 7 L & B 208).

(*i*) Lunacy Act 1890 (53 & 54 Vict c 5) s 294 the words of which are as herein provided and seem to refer to the section and not to the Act generally. Therefore in cases coming within *ibid* s 294 orders for adjudication and for payment of expenses and maintenance cannot be made under ss 288 290 *ibid* (see p 490 *ante*). Orders hereunder are appealable (*F v London Justices Ex parte Edmonton Union* (1896) 60 J P 406) and can be made *ex parte* (*R v Bruce* [1892] 2 Q B 136) see also *Hendon Union v Humphreys* (1893) 62 I J (M C) 170.

(*j*) Lunacy Act 1890 (53 & 54 Vict c 5) s 297. See also title BURIAL AND CREMATION Vol III p 540 and see p 462, *ante*.

**SECT 6** in any institution by any provision in the Lunacy Acts (*k*) concerning lunatics maintenance (*l*)

**Expenses of Pauper Lunatics**

Application of provisions

**1026** The provisions of the Lunacy Acts (*k*) for the payment of expenses of pauper lunatics are applicable to persons confined as pauper lunatics sent to institutions under any Act other than the Lunacy Acts (*m*), authorising their reception as pauper lunatics, and save as otherwise provided for lunatics appearing to have any real or personal property applicable for maintenance to all other lunatics sent to any institution under a justices order prior to the Lunacy Acts (*k*) or under a summary reception order made by a justice under the Lunacy Acts (*l*) or under an order of two or more Commissioners as if such last mentioned lunatics were at the time of being so sent actually chargeable to the union from which they are sent (*n*)

**SUI SECT 3—Payment and Recovery of Expenses**

Payment without order

**1027** Guardians upon whom an order for payment might be made may pay without an order (*o*) and may charge the payment to such account as they could have done if an order had been made (*p*)

Recovery of expenses of medical examination

**1028** The guardians may recover any sum paid under the order for medical examination and detention of a lunatic or alleged lunatic from him or his estate and from the person or authority legally liable for his maintenance (*q*)

Recovery on default of treasurer of authority or of guardians

**1029** If the treasurer of any local authority upon whom any order of justices for the payment of money is made refuses or neglects for twenty days after due notice of the order to pay the money with the expenses of recovering it, may be recovered by distress and sale of such treasurer's goods by warrant under the hands of two justices or by an action or other proceeding. In the case of guardians so refusing or neglecting to pay the money, with the expenses may be recovered by an action or other proceeding (*r*). In any such action or proceeding no objection can be

(*k*) See note (*l*) p 112 *ante*

(*l*) Lunacy Act 1890 (53 & 54 Vict c 5) s 296. The fact that a maintenance order has been obtained against a husband is no reason why a similar order should not be obtained against a son (*Cole v Brown* [1907] 2 K B 301). See generally title POOR LAW.

(*m*) 1 *g* Criminal Lunatics Act 1861 (47 & 48 Vict c 64) s 8. Army Act, 1881 (44 & 45 Vict c 38) s 91. Naval Enlistment Act 1884 (47 & 48 Vict c 46) s 3 as to the Lunacy Acts, see note (*l*) p 412 *ante*.

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 298.

(*o*) But if they pay by mistake and without justices order when no order could have been made against them they cannot recover the amount (*Ipswich Union v Macclesfield Union* (1890) 55 J P 134).

(*p*) Lunacy Act, 1890 (53 & 54 Vict c 5) s 295.

(*q*) *Ibid* s 285.

(*r*) For payment of debts by guardians see Poor Law (Payment of Debts) Act 1859 (22 & 23 Vict c 49). Such weekly sum for maintenance ordered by justices to be paid under the Lunacy Act 1890 (53 & 54 Vict c 5) s 287 (see p 490 *ante*) is a debt claim or demand due from guardians within the meaning of the Lunacy Act, 1890 (53 & 54 Vict c 5) (*R v Stepney Union* (1871), L. R.

taken to any defect or want of form in any reception or maintenance order, certificate, or adjudication if the order or adjudication (s) has not been appealed against, or if appealed against, has been affirmed (t)

**SECT 6**  
**Expenses of Pauper Lunatics.**

**1030** If it appears to any justice that a lunatic chargeable to any union or local authority (u) has any real or personal property more than sufficient (a) to maintain his family (if any) such justice may order a relieving officer of the union or the treasurer or some other officer of the local authority to seize so much of any money (b) or to seize and sell so much of any other personal property (c) and to receive so much of the rents of any land (d) of the lunatic as the justice may think sufficient to pay for the maintenance and incidental expenses incurred and to be incurred in relation to the lunatic (e) If (f) any trustee or bank or other society or person

Seizure and sale of lunatic's surplus property

9 Q 1 383) and must accordingly be paid or proceedings taken to recover it within the time thereby limited

(s) The adjudication is conclusive for the purposes of this provision. Thus in an action under this provision to recover expenses of maintenance from guardians against whose union an order was made evidence to show that the order was in fact wrongly made or that the lunatic had since acquired a fresh settlement was held inadmissible (*Suffolk County Lunatic Asylum (Visiting Committee) v Nottingham Union Guardians* (1905) 69 J P 120)

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 314

(u) The benefit of this provision is intended to be given to any local authority in fact maintaining the lunatic and is applicable to the case of a person originally confined as a pauper but since classified as a private patient (*R v Fulham Guardians* [1909] 2 K B 504) and also to the case of a lunatic not confined in an asylum

(a) It is to be noted that the wants of the lunatic's family must be satisfied before the local authority can seize and apply towards the lunatic's maintenance only the overplus not so needed can be seized the policy being not to deprive such persons of the necessities of life without which they would themselves become chargeable compare *Re Tye (a Person of Unsound Mind not so Found)* [1900] 1 Ch 249 C A

(b) Money in the Post Office Savings Bank was seized in *Re Bethel's Application* (1899) 50 T 1 492

(c) There is no jurisdiction to order a seizure of a lunatic's shares in a company (*Re Noyce* [1892] 1 Q B 97) In such a case a vesting order from the High Court would be necessary

(d) A mortgagee's statutory right to appoint a receiver would appear to have priority over the local authority's rights given by this provision

(e) These do not affect the jurisdiction of the judge in lunacy as to which see pp 412 *et seq ante* He has of course discretion in the application of the lunatic's property and can apply such property for the lunatic's maintenance without regard to the question of whether the same is more than sufficient to maintain his family (*Re Tye (a Person of Unsound Mind not so Found) supra*) So also guardians will be restrained from enforcing an order under this provision when once an order in lunacy has been obtained (*Winkler v Basley* [1897] 1 Ch 123) As to a claim by guardians against the representatives of a deceased lunatic see p 441 *ante* The Summary Jurisdiction Acts (as to which see title MAGISTRATES) have no application to these orders (Summary Jurisdiction Acts 1848 (11 & 12 Vict c 41) s 30 1879 (42 & 43 Vict c 49) s 54) which should be applied for in open court The justices have no power to give costs nor have they power to state a case (*Re Bethel's Application supra*) As to the rights of guardians in respect of the property of paupers under the Poor Law Amendment Act 1819 (12 & 13 Vict c 103) s 16 see title POOR LAW

(f) This provision is permissive only, and imposes no obligation on the



**SECT 6** having possession of any property of a lunatic pay or transfer the same as aforesaid in or towards repayment of the charges above mentioned whether under an order or without an order (g), such officers or treasurers receipt shall be a good discharge (h)

**Appeal against justice's refusal of order** **1031** Any person aggrieved by the refusal of an order by a justice or justices as to the payment of expenses of pauper lunatics (i) may appeal to quarter sessions upon giving fourteen days notice to the justice or justices against whom the appeal is made. The determination of the court on the appeal is final (k)

**Order of county court** **1032** The power of a county court judge to make an order for payment of expenses incurred by guardians is dealt with elsewhere (l)

**Other remedies** **1033** Apart from the provisions of the Lunacy Acts (m) local authorities can recover sums expended by them for the relief or maintenance of a pauper lunatic—

**(1) Judgment in ordinary action** (1) By obtaining judgment against him when alive (n), or against his estate when dead (o) as ordinary creditors. There is an implied common law obligation on the lunatic to refund the amount so expended (limited to six years arrears (p)) if able so to do (n)

**(2) Petition for payment out of fund in court** (2) Where money to which the lunatic is entitled has been paid into court a petition for payment out to the guardians may be presented (q). But there is a discretion to refuse an order for repayment unless it be for the benefit of the lunatic (r)

**(3) Receipt of annuity or other periodical payment** (3) Where a pauper is entitled to an annuity or other periodical payment the trustee or person liable therefor may from time to time pay to the guardians (whose receipt is a good discharge) the cost incurred in the relief of the pauper accrued since the last

persons named to pay (*Wylie v Laidley* [1897] 1 Ch 123 *Re Newbegin's Estate Eggleton v Newbegin* (1891) 1 Ch D 417 *per* CHITTY J at p 481)

(g) It is advisable and in the best Office it is the invariable rule to require a justice's order before payment

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 299

(i) See pp 490 *et seq ante*

(j) Lunacy Act 1890 (53 & 54 Vict c 5) s 301

(l) See title COUNTRY COURTS Vol VIII p 610

(m) See note (l) p 412 *ante*

(n) *Re Clabbon (an Infant)* [1904] 2 Ch 465 *Birkenhead Union Guardians v Brookes* (1906) 95 L T 359 and *Re Newbegin's Estate Eggleton v Newbegin supra*

(o) *Re Webster Denby Union Guardians v Sharratt* (1884) 27 Ch D 710 *Re Dreuey's Trust* (1854) 2 W R 436 *Laver v Chesterfield Union* (1894) 43 W R 25 *Re Watson Stamford Union v Bartlett* [1899] 1 Ch 1

(p) *Re Watson, Stamford Union v Bartlett supra* *Re Harris* (1880) 49 L J (CH) 327 O A *Re Newbegin's Estate Eggleton v Newbegin supra*

(q) *Re Upfull's Trust* (1901) 3 Mac & G 281 *Re Larker* (1854) 2 W R 139 *Re Dreuey's Trust supra*

(r) *Re Buckley's Trust* (1860) John 100 The court whilst refusing payment for past maintenance, has authorised the application of dividends for future maintenance (*Re Coleman's Trusts* (1866) 11 L T 587) and payment of the sum annually certified to have been expended by the guardians in each year has been sanctioned, every such payment to be on account of arrears (*Re Williams Trusts* (1897) 122 L T Jo 366)

instalment (s) Relief given to a pauper who is a member of a benefit or friendly society constitutes a debt recoverable from him self or his representative after his death and the managing body of the society must on notice pay the money in their hands to the guardians, whereupon they will be exonerated from any further liability in respect thereof Should the trustee or society decline to make the necessary payment the guardians may apply to the justices in petty sessions for an order for payment (t)

SECT 6  
Expenses of  
Pauper  
Lunatics

(4) By grant of letters of administration to the estate of a deceased pauper lunatic in favour of the guardians or their nominee as creditors (a) or by a similar grant of letters of administration to the estate of a deceased sane person for the use and benefit of a pauper lunatic next of kin maintained at the guardians expense (b)

(4) By representation to estate

(5) The guardians can also apply by summons in lunacy for the appointment of their nominee as receiver of the lunatic's estate and payment of six years arrears of maintenance (c)

(r) Appointment of receiver

#### SUB SECT 4 — Adjudication of Settlement

**1034** Any two justices for the county or borough in which an institution for lunatics where a pauper lunatic is or has been confined is situate (d) or to which such institution being an asylum, wholly or in part belongs or from any part of which any pauper lunatic is or has been sent for confinement, may at any time inquire

Who may  
adjudicate

(s) Divided Parishes and Poor Law Amendment Act 1866 (39 & 40 Vict c 61) s 23

(t) *Ibid* The justices jurisdiction only extends to undisputed amounts (*R v Richardson* [1894] 2 Q B 323) and a trade union is not a benefit or friendly society for these purposes (*Winder v Kingston on Hull Corporation for the Poor (Governors and Guardians)* (1888) 20 Q B D 412) As to the conditions to which such claim is subject and the sums (including those required to maintain membership in the benefit or friendly society) which take priority thereto see Poor Law Amendment Act 1894 (42 Vict c 12) s 1 and title FRIENDLY SOCIETIES Vol XV p 149

(a) Citation of next of kin and the King's Proctor is usually necessary before a grant will be authorised (*Lambeth Guardians v Bradshaw's Next of Kin* (1886) 57 L T 86) though notice instead of citation may be accepted where the estate is small (*In the Goods of Leece* [1891] P 6 see also *In the Goods of Reeves* (1890) 55 J P 24 *Re Byrne* (1888) 52 J P 281 *In the Goods of Luce* (1890) 54 J P 695 *In the Goods of King* (1893) 58 J P 464 *In the Goods of Lushwrap* (1891) 55 J P 25) As to grants of administration to creditors see title EXECUTORS AND ADMINISTRATORS Vol XIV pp 188 *et seq*

(b) Grants have been made to guardians or then clerk for the use and benefit of lunatics in the case of a lunatic daughter sole next of kin of her deceased mother (*In the Goods of Findlay Miss End Old Town Guardians v Findlay* (1863) 3 Sw & Tr 265) a lunatic husband whose wife died intestate (*In the Goods of Eccles* (1889) 15 P D 1) and a lunatic widow whose husband died intestate (*In the Goods of Everley* [1892] P 50) In the above cases the sureties were required to justify

(c) *Re Taylor Edmonton Union v Deely* [1901] 1 Ch 480 C A. But these applications are not favoured the view of the masters in lunacy being that the clerk to the guardians is under ordinary circumstances an undesirable person to be appointed receiver of the patient's estate

(d) Orders can only be made under this provision where the lunatic is confined in an institution no order can be made where the lunatic is in the work house.

**SECT 6**  
**Expenses of**  
**Pauper**  
**Lunatics**

into such lunatic's settlement (e), and may adjudge the settlement and order the guardians to pay to the guardians of any other union the expenses, referred to as incidental expenses incurred in or about the lunatic's examination and appearance before a justice or justices, and his removal and conveyance to or from any institution, and all moneys paid by such guardians to the treasurer or manager of the institution for the lunatic's maintenance incurred within the previous twelve months (f) and if the lunatic is still in confinement to pay to such treasurer or manager the future maintenance of the lunatic (g)

Where  
 settlement  
 cannot be  
 ascertained

**1035** If a pauper lunatic is not settled in the union from which he was sent to an institution for lunatics and his settlement cannot be ascertained (h) and the lunatic was sent from a quarter sessions borough which is free from contributing to payment of expenses of pauper lunatics chargeable to the county in which the borough is situate, or from a place not in such a borough then the relieving officer of the union must give to the clerk of the local authority within whose area the lunatic is found ten days notice to appear before two justices having jurisdiction within such area (i)

Such justices may adjudge the lunatic to be chargeable to the local authority and order the local authority's treasurer to pay the guardians the incidental expenses of the lunatic and all moneys paid by such guardians for the lunatic's maintenance incurred within the previous twelve months (j) and also to pay the lunatic's future maintenance (k). The justices can direct other inquiries to ascertain the union of settlement and may delay the adjudication until after such inquiries (l)

Local  
 authority

**1036** Every local authority to whom a pauper lunatic is adjudged chargeable may make inquiries and may procure him to be

chargeable  
 may procure  
 another  
 settlement

- (e) Lunacy Act 1890 (53 & 54 Vict c 5) s 268  
 (f) The limitation of twelve months only applies to the lunatic's maintenance not to the incidental expenses (*R v Winstet (Inhabitants)* (1850) 14 Q B 344)  
 (g) Lunacy Act 1890 (53 & 54 Vict c 5) s 289. Adjudication orders with payment of incidental expenses can be made after the death or discharge of the lunatic. So long as it stands an adjudication order is final and conclusive (*Suffolk County Lunatic Asylum v Nottingham Union Guardians* (1905) 69 J P 120) but it can be got rid of if fresh facts proving a change of settlement appear (*West Derby Union v Liverpool Vestry* (1882) 46 J P 372). It may be made *ex parte* and an appeal lies to quarter sessions (*R v London Justices Ex parte Edmonton Union* (1896) 60 J P 456)  
 (h) A person born in Scotland Ireland the Channel Islands or any foreign country and not having gained any settlement in England is a person whose settlement cannot be ascertained (*Dorsetshire (Clerk of the Peace) v Shipham Overseers* (1863) 3 B & S 507). So also apparently is a lunatic with an acquired settlement which has been destroyed by the division of a parish under the Local Government Act 1894 (56 & 57 Vict c 73) (*R v Newchurch (Inhabitants)* (1862) 3 B & S 101)  
 (i) Lunacy Act 1890 (53 & 54 Vict c 5) s 290 (1)  
 (j) See note (f) *supra*  
 (k) The local authority has no appeal, the order being in the nature of an interim order (*Wilson v Liverpool Overseers* (1851) 17 Q B 303). Where application under this provision is opposed the burden of proof that the lunatic had in fact a settlement is on the respondents (*Chertsey Union v Surrey (Clerk of the Peace)* (1893) 57 J P 372)  
 (l) Lunacy Act 1890 (53 & 54 Vict c 5) s 290 (2) (3) compare *All Saints, Poplar v Middlessex (Clerk of the Peace)* (1860) 24 J 1 661

## PART XI — ADMINISTRATION.

adjudged to be settled in any other union (*m*) and thereupon any two justices of the county or borough in which the institution where the lunatic is confined is situate, or from any part of which the lunatic was sent, or any two justices being visitors of the institution, may order payment by the guardians to the local authority of the lunatic's maintenance incurred within the previous twelve months and may provide for payment of his future maintenance (*n*)

### SECT 6 Expenses of Pauper Lunatics

**1037** The party obtaining any adjudication with regard to settlement must, within a reasonable time send a copy to the guardians in whose union the lunatic is adjudged to be settled together with a statement of the description and address of the guardians or clerk obtaining the order (*o*) and the place of confinement of the lunatic and the grounds of adjudication. On the hearing of an appeal against the order (*p*) the respondents must not give evidence of any other grounds in support than those set forth in the statement (*q*)

Copy of  
adjudication  
to guardians  
of union of  
settlement

### SUB SECT 5 — *Appeal from Order of Adjudication*

**1038** The guardians may appeal (*r*) to quarter sessions for the county or borough (*s*) on behalf of which the order was obtained or in which the union obtaining the order is situate or where such union extends into several counties then to the next quarter sessions for the county or borough in which the institution where the lunatic is or has been confined is situate (*t*)

The appellate  
court

**1039** The clerk to the justices making the order or if they have no clerk the clerk of the peace to whom the depositions must be sent must, within seven days after application by any party authorised to appeal furnish a copy of the depositions to the applicant on payment. No omission or delay in furnishing such copy is a ground of appeal, and on the trial of the appeal an order cannot be set aside wholly or in part on the ground that the depositions do not furnish sufficient evidence to support, or that any matter therein contained or omitted raises an objection to, the order or grounds on which it was made (*u*)

Supply of  
copy of order  
to appellant

(*m*) See note (*g*) p 496 *ante*

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) ss 290 (4) 291

(*o*) Omission of the description and address can be amended under s 307 (*R v Manchester Guardians* (1856) 6 L & B 919) see p 498 *post*

(*p*) See the text *infra*

(*q*) Lunacy Act 1890 (53 & 54 Vict c 5) s 302

(*r*) The provisions of the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 do not apply to these appeals (Lunacy Act 1890 (53 & 54 Vict c 5) s 313)

(*s*) As to when the appeal lies to county quarter sessions and when to borough quarter sessions see Archbold's Poor Law 15th ed 477. Where the notice is erroneously given to borough sessions and before being acted on by either party proper steps are taken to rectify the mistake the mention of borough sessions may be treated as surplusage. Not so however where the notice has been acted on (*R v Salop Justices* (1854) 19 J P 149)

(*t*) Lunacy Act 1890 (53 & 54 Vict c 5) s 303. As to appeal from an order of justices adjudicating that a pauper lunatic has acquired a status of irremovability see *Eastbourne Guardians v Croydon Guardians* [1910] 2 K B 16. The court has power to adjourn the hearing of a part-heard appeal (*R v Cambridge Union Guardians* (1861) 9 W R 599)

(*u*) Lunacy Act 1890 (53 & 54 Vict c 5) s 304. If the justices have no clerk,

## SECT 6

**Expenses of  
Pauper  
Lunatics**

Notice of  
appeal  
Grounds of  
appeal

**1040** Notice of appeal must be sent to the party who obtained the order within twenty one days after the sending of the copy of the order or within fourteen days after the supply of a copy of the depositions (v) The appellant must, with the notice, or fourteen days at least before the first day of the sessions at which the appeal is to be tried send to the respondent a statement of the grounds of such appeal and cannot on the hearing give evidence of any other grounds (a)

Objections to  
form

**1041** No objection is allowed on account of any defect in the form of setting forth any ground of adjudication or appeal in any such statement and no objection to the reception of legal evidence offered in support of any ground alleged to be set forth is to prevail unless the court considers that such alleged ground is so imperfectly set forth as to be insufficient to enable the party reviewing the same to prepare for trial Where the court considers that either of such objections ought to prevail the court may cause the statement to be amended or may postpone the trial (b)

Amendment  
of order

**1042** If an objection is made on appeal or on *certiorari* on account of an omission or mistake in drawing up the order and it is shown that sufficient grounds were proved before the justices to authorise the drawing up thereof free from the omission or mistake the court can amend the order and give judgment on such terms as it thinks fit (c) No objection as to such omission or mistake will be allowed on a *certiorari* unless specified in the rule for issuing the writ (d) The court's decision on (1) the sufficiency and effect of the statement and of the copy or duplicate order sent to the appellant and (2) the amending or refusal to amend the order or the statement is final (e)

Order for  
costs

**1043** The court can order payment of costs and charges by the unsuccessful party and can certify the amount (f) Grounds set out in the statement which in the court's opinion are frivolous or

the party obtaining the order must so state in the statement of the grounds of adjudication (Lunacy Act 1890 (53 & 54 Vict c 5) s 304 (v) *R v St Ieter Barton upon Harber (Inhabitants)* (1851) 17 Q B 630 *Heston Overseers v St Irides Overseers* (1803) 11 & B 583)

(v) Lunacy Act 1890 (53 & 54 Vict c 5) s 305 *William v Burgess* (1840) 12 Ad & El 635

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 306 The court can enter and respite an appeal although the statement was sent neither with the notice of appeal nor within fourteen days of the first day of the sessions to which the notice relates (*Bath Union Guardians v Woolwich Union Guardians* (1904) 68 J P 240 *R v Shropshire Justices* (1838) 8 Ad & El 1.3)

(b) Lunacy Act, 1890 (53 & 54 Vict c 5) s 307

(c) The court must not amend the order in such a way as to change the parties to the appeal (*Re Lancaster R v Liverpool (Inhabitants)* (1860) 24 J P 646) As to *certiorari* see title CROWN PRACTICE Vol X pp 155 *et seq*

(d) Lunacy Act, 1890 (53 & 54 Vict c 5) s 308

(e) *Ibid* s 310 In *Leppington v Canterbury Union* (1908) 73 J P 411, it was held that quarter sessions could not for this reason state a case for the opinion of the High Court

(f) The order for costs must be made by the sessions which heard the appeal (*R v Staffordshire Justices* (1857), 22 J P 209)

vexatious will render the party setting up the same liable for the other party's costs of disputing them (a)

SECT 6.  
Expenses of  
Pauper  
Lunatics

**1044** When an order has been made the party who obtained the order, whether notice of appeal has been given or not, and whether the appeal has been entered or not may abandon the order by notice to the appellant or party entitled to appeal and thereupon the order and all proceedings thereon will be void and cannot be given in evidence should any other order for the same purposes be obtained (b) and the party abandoning must in case of an appeal pay the appellant's costs (c)

Abandonment  
of order

**1045** The guardians clerks to guardians and relieving officers of every union and the clerk of the local authority interested in the inquiry or appeal as to settlement and persons duly authorised by them or him must be allowed free access in the presence of the medical attendant to the lunatic to examine him (d)

Access to  
lunatic

## Part XII — Reception and Care of Lunatics and Idiots

### SECT 1 — Reception of Lunatics

#### SUB SECT 1 — In General

**1046** Except for a short time in urgent cases (e) or in the case of relatives or friends (f) a person can only be lawfully detained against his will as a lunatic under an order made by some person authorised by law (g) Such orders may be made (1) by a judicial authority on petition (h) (2) in a summary way without petition by a justice or a chairman of guardians (i) (3) by two or more Commissioners in Lunacy (k) (4) by a committee of the person or a master in lunacy in the case of a lunatic so found by inquisition (l) and (5) in urgent cases by a relative of the lunatic (m)

Lawful  
detention

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s 309

(b) *Ibid* s 311 (1)

(c) *Ibid* s 311 (2) as to taxation see *ibid* s 311 (3)

(d) *Ibid* s 312

(e) See p 500 *post*

(f) See p 501 *post*

(g) See Lunacy Act 1890 (53 & 54 Vict c 5) s 4 (1) and as to the penalty for detaining lunatics without authority *ibid* s 315 and p 501 *post* As to reception orders made before the Act the person who signed the order is clothed with all the powers and subject to all the obligations of a petitioner for a reception order under the Act see Lunacy Act 1890 (53 & 54 Vict c 5) s 336

(h) See p 501 *post*

(i) See p 505 *post*

(k) See pp 499 509 *post* As to the Commissioners in Lunacy see p 466 *ante*

(l) See p 410 *ante* As to committees of the person and masters in lunacy, see pp 414 423 *ante*

(m) See note (g) p 500 *post*

## SECT 1

## Reception of Lunatics

## Order of Commissioners

**1047** Any two or more Commissioners may visit a pauper lunatic or alleged lunatic not in an institution for lunatics or workhouse, and may if they think fit, call in a medical practitioner. Should the latter sign a medical certificate with regard to the lunatic, they may by order direct the lunatic to be received in an institution for lunatics, and may require the relieving officer of the district or any constable to convey him to such institution (*n*)

## Order of committee of person or master

**1048** A lunatic so found by inquisition may be received in an institution for lunatics or as a single patient upon an order signed by the committee of the person of the lunatic, and having annexed thereto a copy of the order appointing the committee or if no such committee has been appointed upon an order signed by a master (*o*)

## Urgency order

**1049** In cases of urgency where it is expedient either for the welfare of a person (not a pauper) alleged to be a lunatic or for the public safety that the patient should be forthwith placed under care and treatment he may be received and detained in an institution for lunatics or as a single patient upon an urgency order (*p*) made if possible, by the husband or wife or by a relative of the alleged lunatic, accompanied by one medical certificate (*q*). But this procedure should only be adopted where instant intervention is required either for the sake of the alleged lunatic or for the sake of the public (*r*). An urgency order will remain in force for seven days from its date or, if a petition for a reception order is pending then until the petition is finally disposed of (*s*)

## Removal to workhouse in urgent cases

**1050** If a constable, relieving officer or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic that the latter should before proceedings can be taken be placed under care or control he may remove the alleged lunatic to

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 23. The order if it appears to be in conformity with the Act is a sufficient authority to anybody acting thereunder (see *ibid* s 35(1) and pp 510 *et seq* *p st*) but will cease to have any force unless it is acted upon within seven clear days from its date (Lunacy Act 1890 (53 & 54 Vict c 5) s 36(3))

(*o*) *Ibid* s 12

(*p*) An urgency order if it appears to be in conformity with the Act is a sufficient authority to anybody acting thereunder (see *ibid* s 35(1) and p 510 *post*)

(*q*) Lunacy Act 1890 (53 & 54 Vict c 5) s 11(1). The medical certificate must contain a statement that it is expedient for the welfare of the alleged lunatic or for the public safety that he should be forthwith placed under care and treatment with the reasons for such statement (*ibid* s 28(3)) and it must appear from it that the alleged lunatic was examined not more than two days before reception (*ibid* s 29(3)). The forms to be used are set out in Sched II (*ibid*) and must include a statement of particulars (*ibid* s 11(7)). An urgency order may be signed before or after the medical certificate (*ibid* s 11(2)). If not signed by the husband or wife or a relative of the patient the order must state the reason for this omission and the connection with the patient of the person who signs and the circumstances under which he signs (*ibid* s 11(3)). The person signing must be twenty one years of age and must have seen the patient within two days from the date of the order (*ibid* s 11(4)). If an urgency order is made before a petition for a reception order is presented it must be referred to in the petition. If made after the presentation of a petition a copy thereof must be sent to the judicial authority to whom the petition has been presented (*ibid* s 11(5)).

(*r*) *Re Cathcart* [1893] 1 Ch 466 O A *per* Lord HALSBURY LC at p 476

(*s*) Lunacy Act 1890 (53 & 54 Vict c 5) s 11(6)

## PART XII—RECEPTION AND CARE OF LUNATICS AND IDIOTS

the workhouse of the union in which the alleged lunatic is, and the master of the workhouse must, unless he has no proper accommodation, receive and detain him for a period not exceeding three days, before the expiration of which period the constable, relieving officer, or overseer must take the necessary proceedings for a summary order before the judicial authority (t)

SECT 1  
Reception of  
Lunatics

**1051** A relation or friend may be allowed to retain or take a lunatic as to whom a summary reception order might be made under his own care provided that a justice having jurisdiction to make such summary reception order, or the visitors of the asylum in which the lunatic is or is intended to be placed, are satisfied that proper care will be taken of the lunatic (u)

Retention by  
relation or  
friend.

Any relative or friend of a pauper lunatic confined in an asylum may on application be authorised by the visiting committee to take charge of him but the committee must be satisfied that the lunatic will be properly taken care of and that the application has the approval of the guardians to whom the lunatic is chargeable, or the local authority liable for his maintenance and in case the proposed residence is outside the limits of such union or such local authority's area, then the approval also of a justice having jurisdiction in the place where the relative or friend resides. When such order is made the authority liable for maintenance must to an amount in its discretion pay to the person taking charge an allowance for the lunatic's maintenance which however, must not exceed the expenses the authority would have been put to had the lunatic remained in the asylum (a)

Care of pauper  
lunatic by  
relative or  
friend

### SUB SECT 2—Reception Orders on Petition

**1052** Reception orders on petition must be made by a judicial authority (b). The statutory powers of the judicial authority may

Judicial  
authority

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 20. Under this provision an absolute discretion is vested in the constable, relieving officer or overseer with regard to the duties imposed on him thereunder. So in a case where a plaintiff was taken by a relieving officer to an infirmary upon a certificate of a doctor that he was insane and the plaintiff turned out to be sane he was non-suited in an action for damages against the doctor whose certificate was not the *causa causans* of the removal to the infirmary (*Thomson v Schmidt* (1891) 56 J P 212 C A). The officer has only to be satisfied that it is necessary for the public safety or for the welfare of the alleged lunatic that he should be placed under care and control and if a jury find that although satisfied the officer did not take reasonable care to satisfy himself and award damages against him judgment will be entered for the officer (*Harvard v Hackney Union* (1898) 62 J P 221 C A). See also *Morris v Atkins* (1902) 18 T L R 628 C A. *Welsh v Duckworth* (1902) 18 T L R 633. Whether the patient is or is not a lunatic the expenses of his maintenance in the workhouse can be recovered as a necessary at common law (*West Ham Union Guardians v Pearson* (1890) 62 L T 638). As to the proceedings to be taken see p 494 ante.

(u) Lunacy Act 1890 (53 & 54 Vict c 5) s 22.

(a) *Ibid* s 51 (1) (2). For the definition of a relative see *ibid* s 341. For the purposes of the Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (f) a lunatic boarded out is deemed to be a lunatic maintained in an asylum. This boarding out will not therefore disentitle the guardians to continue to receive from the county council the 4s grant—in cases where it is made (see p 490 ante)—in respect of paupers so boarded out (Lunacy Act 1890 (53 & 54 Vict c 5) s 57 (3)). As to allowance for maintenance see pp 488 et seq ante. As to visits by medical officer see p 472 ante, and as to removal back to the asylum see p 519, post.

(b) A reception order cannot be made by a relative of the petitioner or of



**SECT 1**  
**Reception of Lunatics**

be exercised by (1) a justice of the peace appointed annually by justices of county and quarter sessions boroughs out of their own body to exercise lunacy jurisdiction (c), or in any place where there are no separate quarter sessions a justice appointed under the hand of the Lord Chancellor to exercise lunacy jurisdiction (d), (2) a county court judge (e), (3) a stipendiary or metropolitan police court magistrate (f)

A county court judge or magistrate is not required to exercise his statutory powers so as to interfere with or delay the exercise of his ordinary jurisdiction (g)

**Jurisdiction and powers**

Every judicial authority in the exercise of his lunacy jurisdiction has the same jurisdiction and power as regards the summoning and examining of witnesses the administration of oaths and other wise as if he were acting in the exercise of his ordinary jurisdiction, and will be assisted, if he so requires by the same officers as if he were so acting (h)

**Evidence in support**

**1053** The application must be made by petition referring to a statement of particulars and two medical certificates (i) The

the lunatic or of the husband or wife of the lunatic (Lunacy Act 1890 (53 & 54 Vict c 5) s 4 (1))

(c) *Ibid* ss 9 (1) 10 (1) A specially appointed justice can whilst sitting in his own county or borough make orders with reference to any lunatic anywhere in England (Lunacy Act 1891 (54 & 55 Vict c 6) s 24 (1) 70 J P (Journal) 119) The above annual appointments of justices are made by justices of a county at their Michaelmas quarter sessions and by justices of a borough at special sessions in October (Lunacy Act 1890 (53 & 54 Vict c 5) s 10 (2)) All the justices of the county or borough may be appointed (Lunacy Act 1891 (54 & 55 Vict c 6) s 24 (1)) Every justice appointed has full authority and his appointment continues until a fresh appointment is made (*ibid* s 24 (5)) whilst even if a reception order be made by a justice not duly appointed subsequent signature within fourteen days by a duly appointed justice will validate the order (*ibid* s 24 (5)) If no appointments or in sufficient appointments are made the Lord Chancellor may by writing under his hand rectify the omission (Lunacy Act 1890 (53 & 54 Vict c 5) s 10 (3)) as may also either the justices of the county or borough or the Lord Chancellor in the case of death absence inability or refusal to act (*ibid* s 10 (4)) Appointments of justices are to be recorded by the clerk of the peace or the clerk to the justices according as there are separate quarter sessions or not in the particular place the names of the justices appointed are to be published in each petty sessional division of the county (*ibid* s 10 (6)) and sent to the Commissioners and to the master in lunacy (Stone's Justices Manual (1911) 781) and the guardians ought also to obtain a list (Local Government Board Circular 23rd April 1890)

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 10 (4)

(e) *Ibid* s 9 (1)

(f) *Ibid* and see *ibid* s 341

(g) *Ibid* s 9 (3) Pursuant to *ibid* s 308 (4) the Lord Chancellor has made a rule providing that a county court judge unable through pressure of other business to deal with a lunacy matter shall sign a certificate in a prescribed form and forward a copy thereof to him and pursuant to the same provision the Secretary of State has made a similar rule applicable to magistrates

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 9 (2)

(i) *Ibid* s 4 (2) The petition must be signed by the petitioner and the statement of particulars by the person making the statement (*ibid* s 5 (4)) This statement is one made in a judicial proceeding and is privileged An action for libel cannot therefore be maintained for any defamatory matter contained therein (*Hodges v Parry*, [1899] 1 Q B 455, O A.) As to privilege generally, see

petitioner should be the husband or wife or a relative of the alleged lunatic, or in default the petitioner must explain why the petition is not presented by such person and the connection of the petitioner with the alleged lunatic and the circumstances under which the petition is presented. The petitioner must be twenty one years of age, and must have personally seen the alleged lunatic within twenty one days of the presentation of the petition.

# SECT 1 Reception of Lunatics

The petitioner

**1054** Upon the presentation of the petition the judicial authority considers it and the evidence in support. He may (1) personally see and examine the alleged lunatic if dissatisfied with the evidence or if he considers such a course advisable or (2) he may make an order forthwith or (3) he may appoint a time not more than seven days after presentation of the petition, for the consideration thereof and may make further inquiries or (4) he may at the time appointed for consideration dismiss the petition or adjourn the matter for not more than fourteen days from the first hearing for further inquiries to be made and may summon any person to attend before him (*h*).

Duty of  
judicial  
authority

**1055** When a petition is dismissed the judicial authority delivers to the petitioner a statement of his reasons for dismissing the same

Procedure on  
dismissal

title LIBEL AND SLANDER Vol XXIII pp 677 *et seq* Should the medical certificate omit to state the name of the street and the number of the house but simply that the doctor examined the lunatic in A (a considerable town) the certificate is defective and the lunatic may be discharged on *habeas corpus* on the ground that the detention is illegal unless it be shown that it would be injurious to himself or others to set him at liberty (*Re Greenwood h v Under* (1855) 24 I J (q b) 148). The petitioner must undertake to visit the patient at least once in every six months such undertaking being recited in the order (Lunacy Act 1890 (53 & 54 Vict c 5) s 5(3)). The medical certificates must not be signed by the petitioner or by his husband or wife near relative partner or assistant (*ibid* s 30). Wherever practicable one of the certificates must be signed by the alleged lunatic's usual medical attendant and where impracticable an explanation (to be treated as part of the petition) must be furnished (*ibid* s 31). Interested parties such as the manager or regular medical attendant of the institution where the patient is to be detained persons interested in payments on his behalf or their partners or assistants or near relatives of any of the above are precluded from signing medical certificates (*ibid* s 31) as also are Commissioners or visitors unless acting at the request of a judicial authority a judge in lunacy or a Secretary of State (*ibid* s 35).

(*h*) *Ibid* s 6 Notice of the time and place appointed for the consideration of the petition must be given to the petitioner personally or sent to him by registered letter at the address given in the petition (*ibid* s 6 (1)). The petition will be considered in private and only the petitioner the alleged lunatic (unless the judicial authority otherwise orders) one person appointed by the alleged lunatic on his behalf and the doctors who signed the medical certificates may be present without the leave of the judicial authority (*ibid* s 6 (3)). The judicial authority and all persons who are present or who have official cognisance of the petition other than the alleged lunatic and the person appointed on his behalf will be bound to keep secret all matters and documents which may come to his or their knowledge by reason thereof except when required to divulge the same by lawful authority (*ibid* s 6 (5)). An order may be made under this provision without any inquiry upon the petition and certificates. By *ibid* s 25 (4) the medical certificates have the same effect as if verified on oath. It is therefore unnecessary for the persons who signed to attend, but if they do not it would appear that their signatures must be proved before the certificates can be taken as evidence. As to the time during which a reception order remains valid, see p. 510, *post*.

**§ 507 1**  
**Reception of**  
**Lunatics**

**Second**  
**petition**

**Right of**  
**patient to be**  
**seen by**  
**judicial**  
**authority**

and sends a copy thereof to the Commissioners, and also, where the alleged lunatic is detained under an urgency order, sends notice of dismissal to the person having charge of the alleged lunatic (*l*)

If after a petition has been dismissed another petition is presented as to the same alleged lunatic, the subsequent petitioner, so far as he has any knowledge of the previous petition and its dismissal must state such facts in his own petition and must also with his own petition lodge a copy, to be obtained from the Commissioners at his own expense of the statement of the reasons for dismissing the first petition. If he wilfully omits to comply with this provision he is guilty of a misdemeanour (*m*)

**1056** When in the reception order made in respect of a private patient no statement is contained that the judicial authority making such order personally saw the patient the latter is entitled to see some other judicial authority (*n*) unless a certificate is sent to the Commissioners by the medical officer of the institution or in the case of a single patient by his medical attendant, within twenty four hours after reception that the exercise of this right would be prejudicial to the patient (*o*). In the absence of such a certificate the doctor or person in charge must within twenty four hours after reception give notice in writing to the patient of his right to see a judicial authority (*n*) and if within seven days the patient expresses a desire to exercise such right, the doctor or person in charge must procure him to sign a notice to that effect and must transmit the same to the judicial authority (*n*) or to the justices clerk (*p*). On receipt of the notice the judicial authority (*n*) either visits the patient or has the patient brought before him (*q*). After personally examining the patient and inspecting if he so desires the evidence on which the reception order was made (*r*) the judicial authority (*n*) reports to the Commissioners who take any necessary steps to give effect to the report (*a*)

(*l*) Lunacy Act 1890 (53 & 54 Vict c 5) s 7 (1). The judicial authority must when required give to the Commissioners all such information as they may require as to the circumstances under which the order was made or refused (*ibid* s 7 (2)) and on the dismissal of the petition or the release of the alleged lunatic the Commissioners may give such information as they think proper to any person who satisfies them that he is a proper person to receive such information (*ibid* s 7 (3)).

(*m*) *Ibid* s 7 (4). For the penalty see p 528 *post*

(*n*) The judicial authority must be a person exercising jurisdiction in the place where the lunatic is confined and not being the judicial authority who made the reception order (Lunacy Act 1890 (53 & 54 Vict c 5), s 8 (4)).

(*o*) *Ibid* s 8 (1)

(*p*) On failure to perform any of the duties imposed on him by this section the doctor or person in charge will be guilty of a misdemeanour (*ibid* s 8 (*v*)) for the penalty see p 528 *post*

(*q*) Lunacy Act 1890 (53 & 54 Vict c 5) s 8 (2)

(*r*) *Ibid* s 8 (3)

(*a*) *Ibid*. Justices' clerks are entitled to their fees for arranging for the above visits and preparing the above reports to the Commissioners out of the county or borough fund and this course has the sanction of the Commissioners

**1057** The petitioner has certain powers of removal (*b*) and discharge (*c*) of the lunatic. The Commissioners may by order substitute for the person upon whose petition a reception order was made and either during his life or after his death any other person who is willing to undertake the duties and responsibilities of the petitioner (*d*).

# **SECT 1** **Reception of Lunatics**

Powers of petitioner  
Substitution

## **SUB SECT 3—Summary Reception Orders**

**1058** A summary reception order is an order for the reception of an alleged lunatic on an application not originated by petition (*e*), and may be made in the case of —

Definition

(1) lunatics not under proper care and control, or cruelly treated or neglected (*f*)

When applicable.

(2) resident pauper lunatics (*g*)

(3) lunatics wandering at large whether they are paupers or not (*h*) and

(4) lunatics in workhouses who ought to be in asylums (*i*)

As regards class (1) the order can only be made by a judicial authority (*k*) but orders dealing with classes (2) (3) and (4) may be made by any justice within his jurisdiction (*l*) or by a chairman of a board of guardians (though not a justice) duly authorised by the Lord Chancellor (*m*).

**1059** Every constable, relieving officer (*n*) and overseer of a parish who has knowledge (*o*) that any person within his district or

(1) Lunatics not under proper care and control or cruelly treated or neglected.

*b*) Lunacy Act 1890 (53 & 54 Vict c 5) s 58 see p 519 *post*

*c*) Lunacy Act 1890 (53 & 54 Vict c 5) s 72 (1) see p 522 *post*. The petitioner's consent must also be obtained for the absence of the patient from the asylum (Lunacy Act 1890 (53 & 54 Vict c 5) s 50 (*i*)) and notice of the patient's death must be sent to him (Commissioners in Lunacy Rules 1895 r 27 (*4*) (*f*)).

*d*) Lunacy Act 1890 (53 & 54 Vict c 5) s 48 (1). From the date of the order the substituted person is subject to all the obligations and may exercise all the powers and authorities of the original petitioner (*ibid* s 48 (2)) but the latter is not released from liabilities already incurred (*ibid* s 48 (3)). An order will not be made without the consent of the petitioner or fourteen days notice to him (*ibid* s 48 (4)) and he may object in writing or appear personally before the Commissioners to object (*ibid* s 4b (*v*)).

*e*) Lunacy Act 1890 (53 & 54 Vict c 5) s 19 (1)

*f*) *Ibid* s 13 see the text *infra* and pp 500 501 *ante*

*g*) Lunacy Act 1890 (53 & 54 Vict c 5) s 14 see p 506 *post*

*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 15 see p 508 *post*

*i*) Lunacy Act 1890 (53 & 54 Vict c 5) s 24 (6) see p 508 *post*

*k*) Lunacy Act 1890 (53 & 54 Vict c 5) s 13 (1) see p 501 *ante*

*l*) Lunacy Act 1890 (53 & 54 Vict c 5) ss 16 24

*m*) Lunacy Act 1891 (54 & 55 Vict c 65) s 20 but the chairman only has jurisdiction to authorise detention in an institution for lunatics which does not include a workhouse (see Lunacy Act 1890 (53 & 54 Vict c 5) s 341 and note (*b*) p 506 *post*)

*n*) Should the guardians with the sanction of the Local Government Board, have directed one relieving officer to discharge throughout the union the duties of relieving officer in respect of lunatics every other relieving officer having the necessary knowledge as to lunatics not under proper care and control or cruelly treated or neglected must inform the relieving officer so directed of the circumstances. The officer so directed then gives information thereof upon oath (Lunacy Act 1891 (54 & 55 Vict c 65) s 2 (2)).

*o*) This may apparently be the personal knowledge of the officer or knowledge

**SECT 1**  
**Reception of Lunatics**

parish, who is not a pauper and not wandering at large, is deemed to be a lunatic, and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the care or charge of him, must within three days after obtaining such knowledge give information thereof upon oath to a justice who is a judicial authority (p)

**Examination by judicial authority and medical practitioners**

Upon such information the judicial authority may visit the alleged lunatic and must in any case direct two medical practitioners to examine the alleged lunatic and to certify as to his mental state (q) Each of the medical practitioners must examine the alleged lunatic separately from the other (r) and each must sign a separate certificate (s) Acting upon the medical certificates or after such inquiry as he thinks necessary (a) the judicial authority may direct the lunatic to be received and detained in an institution for lunatics to which, if a pauper he might be sent (b)

**Conveyance of lunatic**

The constable relieving officer or overseer upon whose information the order has been made (c), or any constable whom the judicial authority may require so to do must either forthwith convey the lunatic to the institution named in the order (d), or may make other proper arrangements for the performance of the duty (e)

**(2) Resident pauper lunatics**

**1060** Every medical officer of a union who has knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic and a proper person to be sent to an asylum must within three days after obtaining such knowledge give notice in

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acquired by him by means of credible information supplied by a trustworthy informant (compare *Lister v Perryman* (1860) L R 4 H L 521)

(p) Lunacy Act 1890 (53 & 54 Vict c 5) s 13 (1) As to such judicial authorities see p 501 *ante*

(q) Lunacy Act 1890 (53 & 54 Vict c 5) s 13 (2)

(r) *Ibid* s 29 (2)

*Ibid* s 13 (1)

(a) The judicial authority must proceed in the same manner so far as possible and has as to the alleged lunatic the same powers as if a petition for a reception order had been presented by the person by whom the information with regard to the alleged lunatic has been sworn (*ibid* s 13 (2) see p 502 *ante*)

(b) Lunacy Act 1890 (53 & 54 Vict c 5) s 13 (3) An institution for lunatics means an asylum hospital or licensed house (*ibid* s 341 see pp 414 418 479 *ante*)

(c) Having regard to the effect of the order (see Lunacy Act 1890 (53 & 54 Vict c 5) s 30 (1) and p 510 *post*) even if the patient so properly conveyed under lawful authority to the asylum were of sound mind it would not be illegal on the part of the keeper of the asylum to detain him until proper authority for his discharge was received (*Muirintosh v Smith and Lowe* (1860) 4 Macq 91; H L) As to suspension of the execution of the order for a period not exceeding fourteen days and as to temporary removal to the workhouse see p 509 *post* But in all other cases the reception order will cease to be of any force unless the lunatic has been received thereunder before the expiration of seven clear days from its date (Lunacy Act 1890 (53 & 54 Vict c 5) s 36 (1))

(d) *Ibid* s 13 (3)

(e) Lunacy Act 1891 (54 & 55 Vict c 65) s 2 (1) The lunatic must be classified as a pauper until it is ascertained that he is entitled to be classified as a private patient (*ibid* s 3) If it is afterwards discovered that he has means he may be classified as a private patient and discharged on the application of the next of kin (*Re Stenault* (1894) 9 L J 340)

SECT 1  
Reception of  
Lunatics

writing to the relieving officer of the district, or if there is no such officer to an overseer of the parish where the pauper resides (*f*) The relieving officer or overseer, as the case may be, on obtaining such knowledge either through the medical officer or otherwise (*g*), must within three days give notice thereof to some justice having jurisdiction in the place where the pauper resides (*h*) who must either require the relieving officer or overseer giving the notice to bring the alleged lunatic before him or some other justice at some time within three days from the date of the notice (*i*) or examine him at his own house or elsewhere (*l*)

Examination  
by justice

This examination should if possible be made in private and not in open court and where practicable the justice should attend at the place where the alleged lunatic is living whether at his own place of abode or at the workhouse (*l*) The justice must call in a medical practitioner and make such inquiries as he thinks advisable (*m*) and acting on the certificate of the medical practitioner, may direct the lunatic to be received and detained in an institution for lunatics (*n*) But he must not sign the order unless he is satisfied that the lunatic really is a pauper by being in receipt of relief or by being in such circumstances as to require relief (*o*)

How made

Medical  
certificate

The relieving officer overseer, or constable who brought the lunatic before the justice must either forthwith so soon as the order is made (*p*) convey the lunatic to the institution named

(*f*) Lunacy Act 1890 (53 & 54 Vict c 5) s 14 (1)

(*g*) If the relieving officer is aware of the fact that a pauper is a lunatic whether by notice from the medical officer or otherwise it is his duty to act independently of the medical officer and to take the alleged lunatic before a justice Lunacy is not sickness so as to enable the relieving officer to give an order for medical relief under art 215 of the General Consolidated Order compare 50 J 1 528

(*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 14 (2) As to the case when there are two or more relieving officers in the union and one has been directed to discharge the duties throughout the union see note (*n*) p 500 *ante* When a borough has no separate court of quarter sessions the county justices have jurisdiction within the borough concurrently with the borough justices under the Municipal Corporations Act 1832 (45 & 46 Vict c 50) s 154 The powers of a relieving officer or overseer in urgent cases to remove an alleged lunatic to a workhouse and the power of detaining him there for a period not exceeding three days are the same as in the case of a lunatic not under proper care and control (Lunacy Act 1890 (53 & 54 Vict c 5) s 20) see p 500 *ante*

(*i*) Lunacy Act 1890 (53 & 54 Vict c 5) s 14 (3)

(*k*) *Ibid* s 17

(*l*) Circular Letter from Poor Law Board 26th November 1867

(*m*) Lunacy Act 1890 (53 & 54 Vict c 5) s 16 The justice must not act on a certificate by a medical man of whom he knows nothing the doctor must be approved and called in by the justice The justice and doctor must both examine the alleged lunatic but it is not obligatory on the doctor to examine him in the presence of the justice nor on the justice to examine him in the presence of the doctor (*R v Whiffeld* (1885) 15 Q B D 129 C A *per* LINDLEY L J at p 148)

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 16

(*o*) *Ibid* s 18 A person who is visited by a medical officer of the union or parish at the expense of the union or parish is for this purpose to be deemed in receipt of relief (*ibid*)

(*p*) The authority for the order is the same as in the case of lunatics not

SECT 1  
**Reception of Lunatics**

(3) Lunatics wandering at large, whether paupers or not

therein (g) or he may make other proper arrangements for the performance of the duty (r)

**1061** Every constable relieving officer and overseer who has knowledge that any person (whether a pauper or not) wandering at large (s) within his district or parish is deemed to be a lunatic must immediately apprehend and take him or cause him to be apprehended and taken before any justice (t) But in urgent cases the officer may remove the alleged lunatic to the workhouse in a similar manner and subject to similar rules and limit of time, as in the case of lunatics not under proper care and control or resident pauper lunatics (a) and the subsequent proceedings are similar to those in the case of resident pauper lunatics except that (1) the justice must be satisfied before making his order that the alleged lunatic was wandering at large in addition to being a lunatic and a proper person to be detained and (2) the justice need not be satisfied that the lunatic is a pauper (b)

(4) Lunatics in workhouses who ought to be in asylums

**1062** If in the case of a lunatic being in a workhouse (1) the medical officer thereof does not sign a certificate for his detention therein or (2) if at or before the expiration of fourteen days from the date of the certificate an order is not made by a justice for the detention of the lunatic in the workhouse or (3) if after an order has been made the lunatic ceases to be a proper person to be detained in a workhouse the medical officer of the workhouse must forthwith give notice in writing to the relieving officer of the union to which the workhouse belongs who must thereupon proceed in the same manner as in the case of a resident pauper lunatic (c)

under proper care and control (Lunacy Act 1890 (53 & 54 Vict c 5) s 55 (1)) see p 505 *ante* as to suspension of the execution of the order for a period not exceeding fourteen days and as to temporary removal to a workhouse see p 509 *post*

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 16

(r) Lunacy Act 1891 (54 & 55 Vict c 65) s 2 (1)

(s) A person deemed to be a lunatic (by reason of a medical certificate to that effect) and not being under control is a person wandering at large within the meaning of this provision (*Morris v Atkins* (1891) 15 T L L 628 C A per VAUGHAN WILLIAMS L J at p 650)

(t) Lunacy Act 1890 (53 & 54 Vict c 5) s 15 (1) As to when there are two or more relieving officers in the union and one has been directed to discharge the duties throughout the union see note (n) p 505 *ante* and Lunacy Act 1891 (54 & 55 Vict c 65) s 2 (2)

(a) See pp 505 506 *ante*

(b) Lunacy Act 1890 (53 & 54 Vict c 5) ss 16—18

(c) *Ibid* s 24 (6) As to the above mentioned certificate and order see p 509 *post* and as to the proceedings to be taken see p 506 *ante* Where a union is in more than one county and the workhouse of the union is in one county and the place from which the lunatic was sent to the workhouse is in another county an order may be made by a justice for the county from which the lunatic was sent for the removal of the lunatic either to the asylum of the county in which the workhouse is or to the asylum of the county from which the lunatic was sent and such latter order may be made notwithstanding that there may be an asylum of the county in which the workhouse is and there may not be a deficiency of room or any other special circumstances by reason whereof the lunatic cannot conveniently be taken to that asylum (Lunacy Act 1890 (53 & 54 Vict c 5) s 68) see also Lunacy Act 1891 (54 & 55 Vict c 65), s 8

Pending the proceedings for his removal, the lunatic may be retained in the workhouse (*d*)

# SECT 1 Reception of Lunatics

Removal of  
patient from  
workhouse by  
order of Com-  
missioners

**1063** Two or more Commissioners may by order direct that a lunatic or alleged lunatic in a workhouse be removed to an institution for lunatics and such order will have the same effect as a summary reception order (*e*). The guardians of the union may appeal against such an order to the Secretary of State whose decision, made on the report of some person specially authorised by him, is final (*f*).

**1064** A justice making a summary reception order may suspend its execution for any period not exceeding fourteen days and in the meantime may give directions for the proper care of the lunatic (*g*). Where a reception order has been made and the execution of the order has been suspended the lunatic may be received in the institution for lunatics named in the order at any time within fourteen days after the date of the reception order (*h*).

Suspension of  
order by  
justice.

**1065** If a medical practitioner after examining a lunatic as to whom a summary reception order has been made certifies in writing that the lunatic is not in a fit state to be removed the removal must be suspended until the same or some other medical practitioner certifies that the lunatic is fit to be removed and every medical practitioner who has certified that the lunatic is not in a fit state to be removed must as soon as in his judgment the lunatic is in a fit state to be removed certify accordingly (*i*) whereupon the lunatic may be received in the institution for lunatics named in the order within three days after the medical certificate of fitness (*k*).

Suspension of  
removal by  
medical  
practitioner

**1066** In any case where a summary reception order either might be or has been made (*l*) any justice if satisfied that it is expedient for the welfare of the lunatic or for the public safety that the lunatic should forthwith be placed under care and control and if it appears to him that there is proper accommodation for the lunatic in the workhouse of the union in which the lunatic is may make an order for taking the lunatic to and receiving him in that workhouse (*m*). Such an order will not authorise the detention of a lunatic in a workhouse for more than fourteen days, after which period his detention in the workhouse will only be lawful on a

Removal to  
workhouse in  
urgent cases

(*d*) Lunacy Act 1890 (53 & 54 Vict c 7) s 24 (6)

(*e*) *Ibid* s 60 (1)

(*f*) *Ibid* s 60 (2)

(*g*) *Ibid* s 19 (1) An order made on petition must be executed within seven days (*ibid* s 36 (3)) see p 511 *post*

(*h*) Lunacy Act 1890 (53 & 54 Vict c 7) s 36 (1)

(*i*) *Ibid* s 19 (2)

(*k*) *Ibid* s 36 (2)

(*l*) The power to order removal to a workhouse only arises in cases where a summary reception order has been or might be made see p 505 *ante*. It follows that all the requirements (see p 506 *ante*) as to inquiries medical examinations etc laid down by the Lunacy Act 1890 (53 & 54 Vict c 7) ss 13—22 must be fulfilled in the several cases to which they apply before such an order for removal can be made

(*m*) *Ibid* s 21 (1) (2)



**SECT 1**  
**Reception of Lunatics**

certificate of the medical officer of such workhouse (n) Where a reception order has been made and the lunatic has been temporarily taken to the workhouse, he may be received in the institution for lunatics named in the order at any time within fourteen days after the date of the reception order (n)

**Asylum which must be authorised by order**

**1067** Every summary reception order must authorise the reception of the lunatic named therein into an asylum of the county or borough in which the place from which the lunatic is sent is situate unless there is no such asylum or there is a deficiency of room therein (o), or there are any other special circumstances in any of which cases the particular reason being stated in the order, the lunatic may be sent to any other institution for lunatics (p)

**SUB SECT 4—Effect and Duration of Reception Orders**

**Effect.**

**1068** If a reception order appears to be in conformity with the Lunacy Act, 1890 (q), it is a sufficient authority for the petitioner or any person authorised by him to take the lunatic and convey him to the place mentioned in such order and for his reception and detention therein and the order may be acted on without further evidence of the signature or of the jurisdiction of the

(n) Lunacy Act 1890 (53 & 54 Vict c 5) s 36 (1) During the fourteen days there must be a certificate of the workhouse medical officer under *ibid* s 24 (1) which will authorise further detention for fourteen days from the date of the certificate (*ibid* s 24 (2) see p 513 *post*) and during such period an order for continued detention may be made (see *ibid*) Except under the provisions referred to at p 512 *post* there can be no order for continued detention in a workhouse If the case looks like a workhouse case in the first instance the relieving officer should place the lunatic in the workhouse under the Lunacy Act 1890 (53 & 54 Vict c 5) s 20 (see p 500 *ante*) for three days and then apply within that time for a justices order for continued detention under the Lunacy Act 1890 (53 & 54 Vict c 5) s 24 (4) (see p 513 *post*) It will be still open to the justice on that application to make a summary reception order for the asylum instead under the Lunacy Act 1890 (53 & 54 Vict c 5) s 18 (see p 50) *ante* if he is of opinion that it is not a workhouse case and if he has jurisdiction otherwise

(c) As to reserved beds see Lunacy Act 1890 (53 & 54 Vict c 5) s 21b (4) and note (f) p 480 *ante*

(j) Lunacy Act 1890 (53 & 54 Vict c 5) s 21 (1) (i) If on the lunatic's arrival the asylum is found to be full the superintendent should send the lunatic back to the justice making the reception order with a written statement of the reasons why he cannot be taken in in order that the justice may state the circumstances in the order on sending him elsewhere (see *ibid* s 27 (2)) Where a workhouse is situated in a county which does not include the union to which the workhouse belongs a summary reception order made by a justice of the county in which the workhouse is situate may order a lunatic in a workhouse to be received in any asylum to which pauper lunatics chargeable to the union to which the workhouse belongs may legally be received (Lunacy Act 1891 (54 & 55 Vict. c 65) s 6 see p 496 *ante*) A pauper lunatic may not be received into any asylum other than one belonging wholly or in part to the county or borough in which his place of settlement is situate unless there is a subsisting contract for the reception of lunatics of such county or borough therein or such borough otherwise contributes to the asylum into which the pauper is to be received (as to such contracts and contributions see p 486 *ante*) except the order is indorsed by a visitor of that asylum The manager of a hospital or licensed house is not bound to receive any lunatic under any such order except in pursuance of a subsisting contract (Lunacy Act, 1890 (53 & 54 Vict. c 5) s 21 (3) (4))

(g) 53 & 54 Vict. c 5.

person making it (1) A reception order for a private patient made upon petition is not a peremptory order but merely an authorisation (1) for the petitioner, or any person authorised by him, to take and convey the lunatic to the asylum named therein and (2) for the medical superintendent of the asylum to receive the patient and the statute affords no means whereby the execution of the order can be enforced by the judicial authority

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The order ceases to be in force (2) to give the authorisation above mentioned) unless the lunatic is received thereunder before the expiration of seven clear days from its date (3) A petitioner not choosing to execute the order or to cause it to be executed does so at his own risk If he detains the lunatic for payment in an unlicensed house he is guilty of a misdemeanour (4) If after the expiration of the order he detains the party as a lunatic at all he is guilty of a misdemeanour (5) unless he can justify it at common law as necessary to prevent injury to the party himself or to others (6)

Duration of  
validity of  
authorisation

**1069** If a patient is removed temporarily from the place in which he is confined (7) or is transferred from one place of confinement to another (8) the original order and certificate or certificates upon which he was received remain in force (9)

Pending  
temporary  
removal or  
transfer

**1070** An order for the reception of a patient as a pauper will authorise his detention though it afterwards appears that he is entitled to be classified as a private patient and an order for the reception of a private patient will authorise his detention although it afterwards appears that he ought to be classified as a pauper patient (10)

Pending  
reclassification

**1071** If an order or certificate for the reception of a lunatic is after such reception found to be in any respect incorrect or defective it may within fourteen days after such reception be amended by the person who signed it with the sanction of one of the Commissioners and in the case of a private patient the consent of the judicial authority who signed the reception order If the Commissioners consider a certificate to be incorrect or defective they may in writing addressed to the manager of the institution for lunatics

Amendment

(r) Lunacy Act 1890 (53 & 54 Vict c 5) s 35 (1) The order together with the petition statement of particulars and medical certificates upon which the order was made must be delivered or sent by post to the petitioner and must by him or his agent be delivered to the manager of the institution for lunatics in which or to the person by whom the lunatic is to be received (*ibid* s 35 (2))

(s) *Ibid* s 36 (3)

(t) *Ibid* s 31a see p 528 *post*

(u) Lunacy Act 1890 (53 & 54 Vict c 5) s 31a (1)

(v) *Brookshaw v Hopkiss* (1773) Loft, 240 243 *Scott v Wakem* (1867) 3 F & F 328 *Sym v Fraser* (1863) 3 F & F 809 see 50 J P 416

(w) On trial or for health (Lunacy Act 1890 (53 & 54 Vict c 5) s 50) see p 517 *post*

(x) See p 518 *post*

(y) Lunacy Act 1890 (53 & 54 Vict c 5) s 37 (2), and see *ibid* s 38 (3) and note (s) p 502 *ante*

(z) Lunacy Act 1890 (53 & 54 Vict c 5) s. 37 (1) As to classifying a pauper patient as a private one on discovery of his means, see *Re Steneult* (1891) 29 L J 340, and note (c), p. 506, *ante*

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or the person who has charge of the single patient, as the case may be, require it to be amended by the person who signed it, and in default of amendment to their satisfaction within fourteen days may make an order for the patient's discharge. An amended order or certificate will take effect as though the amendment had been contained therein when it was signed (g)

Reception  
orders last for  
one year

**1072** Save in the case of lunatics so found by inquisition (h), a reception order lasts in the first instance for one year from its date. On a special report to the Commissioners by the medical officer of the institution or the medical attendant of the lunatic, as the case may be and a certificate that the patient is a person of unsound mind and a proper person to be detained under care and treatment sent not more than a month nor less than seven days before the reception order expires the order will be automatically continued for another year then on similar evidence for two years, then on similar evidence for three years, then on similar evidence for successive periods of five years (i)

Continuation  
on special  
report

Duty of Com-  
missioners on  
unsatisfactory  
report.

If however in the opinion of the Commissioners the special report does not justify the accompanying certificate then in the case of a patient in a hospital or licensed house or under care as a single patient they must make further inquiries and if dissatisfied they may direct his discharge. In the case of a patient in an asylum the Commissioners must send a copy of the report with any other information in their possession relating to it, to the clerk to the visiting committee of the asylum and the committee must thereupon investigate the case and may discharge the patient or give such directions respecting him as they may think proper (k)

**SUB SECT 5 —Lunatics in Workhouses**

Grounds on  
which  
patients may  
remain in  
workhouse

**1073** Save in certain exceptional cases (l) no person is allowed to remain in a workhouse as a lunatic unless the medical officer of the workhouse certifies in writing—

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 34. The alteration of an order or certificate for reception in any material particular except with the sanction mentioned in the above provision at all events if made with the privy of the person who relies on it makes the whole document invalid and precludes any reliance being placed thereon. But it is not so where the alteration is immaterial (*Lowe v Fox* (1881) 36 W R 25 H L)

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 38 (10)

(i) *Ibid* s 38 (1) Lunacy Act 1891 (54 & 55 Vict c 65) s 7. For the sake of conformity the Commissioners may by orders under their seal direct that reception orders may expire on any quarter day next after the one on which they would otherwise expire (Lunacy Act 1890 (53 & 54 Vict c 5) s 38 (2)). An order for the removal of a patient from one custody to another will not be deemed to be a reception order within *ibid* s 38 but the patient who is removed will after removal be deemed to be detained under the original reception order (*ibid* s 38 (3)). A special report or certificate may refer to more than one patient (*ibid* s 38 (8)).

(k) *Ibid* s 38 (6). The manager of an institution for lunatics and any person having charge of a single patient who detains a patient after knowledge that the reception order has expired is guilty of a misdemeanour (*ibid*, s 38 (7)). For the penalty see p 527 *post*

(l) These exceptional cases are under the Lunacy Act 1890 (53 & 54 Vict

(1) that such person is a lunatic and the grounds for the opinion,

(2) that he is a proper person to remain in a workhouse, and

(3) that there is sufficient accommodation in the workhouse for his care and treatment apart from the other non lunatic inmates or that his condition is such that it is not necessary either for his own convenience or that of the other inmates that he should be kept separate from them (m)

The medical certificate is the authority for detention for fourteen days (n) after which an order of a justice having jurisdiction in the place where the workhouse is situate is required (o) such order being obtained on the application of the relieving officer of the union supported by two medical certificates, one of which must be signed by a medical practitioner not being an officer of the workhouse and one by the workhouse medical officer (p)

**SECT 1**  
**Reception of Lunatics**

Authority for detention

**1074** Where a pauper lunatic is discharged from an institution for lunatics but the medical officer thereof is of opinion that the patient is a proper person to be kept in a workhouse as a lunatic he must so certify and the lunatic may thereupon be received and detained against his will in a workhouse without further order provided that the medical officer of the workhouse certifies that the accommodation therein is sufficient for the lunatic proper care and treatment or that his condition is such that it is not necessary for his convenience or that of the other inmates that he should be kept separate (q)

Pauper lunatic discharged from institution and detained in workhouse

**1075** The visitors of any asylum may with the consent of the Local Government Board and the Commissioners and subject to

Reception of chronic but not dangerous lunatics

c 5) ss 20 21 which refer to temporary removal to the workhouse in urgent cases (see pp 500 509 *ante*) and under a justice's order under the Lunacy Act 1890 (53 & 54 Vict c 5) s 24 (8) dealing with lunatics in workhouses before the passing of the Act and under the Lunacy Act 1890 (53 & 54 Vict c 5) ss 25 26 dealing respectively with discharged paupers who have not recovered and chronic lunatics (see note (g) *infra* and note (r) p 514 *post*) and see Lunacy Act 1891 (54 & 55 Vict c 65) s 4 (1)

(m) Lunacy Act 1890 (53 & 54 Vict c 5) s 24 (1) The doctor who is not the medical officer of the workhouse is entitled to a fee for his certificate from the guardians of the union (*ibid* s 24 (2)). If the medical officer does not sign the certificate mentioned in *ibid* s 24 (1) or a justice's order for detention is not obtained or the lunatic ceases to be a proper person to be detained in the workhouse the medical officer must give notice to the relieving officer and the latter must proceed as though the lunatic were a pauper deemed to be a lunatic and a proper person to be sent to an asylum (*ibid* s 24 (6) see pp 506 507 *ante*). In the case of a lunatic in an asylum under the statutory jurisdiction of the Metropolitan District Asylums Board the necessary proceedings are taken by one of the officers of the asylum nominated by the managers of the asylum district (*ibid* s 24 (7)). The medical certificates on which a justice's order is founded must be attached to such order (Lunacy Act 1891 (54 & 55 Vict c 65) s 5). As to the removal of lunatics from a workhouse to an asylum by order of justices or Commissioners see p 509 *ante*.

(n) Lunacy Act 1890 (53 & 54 Vict c 5) s 24 (2)

(o) *ibid* s 24 (3)

(p) *ibid* s 24 (4)

(q) *ibid* Two certificates are contemplated namely (1) by the medical officer of the institution for lunatics and (2) by the medical officer of the workhouse and a copy of the former must accompany the notice of discharge (Commissioners in Lunacy Rules 1895 r 23 (4)).

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Lunatics

such regulations as they respectively prescribe, make arrangements with the guardians of any union for the reception into the workhouse of any chronic lunatics not being dangerous, who are in the asylum and have been selected and certified by the manager of the asylum as proper to be removed to the workhouse, and every lunatic so received in a workhouse will while he remains there continue a patient on the books of the asylum for the purposes of the Lunacy Act, 1890 (1) so far as it relates to lunatics removed to asylums (s)

SECT 2—(Care and Treatment of Lunatics)

SUB SECT 1—Reports on and Visits to Private Patients

Reports  
to Com-  
missioners  
Report on  
patient in  
licensed  
house

**1076** The medical officer of every institution for lunatics and the medical attendant of every single patient must at the termination of one month from reception of a private patient send a report to the Commissioners in such form as they direct. In the case of a licensed house (t) he must also at the same time send a copy of such report to the clerk of the visitors of licensed houses in the county or borough where the house is situated (u)

Visits by Com-  
missioners

On receipt of this report as to any patient in a licensed house within their immediate jurisdiction (w) the Commissioners must arrange for an early visit by one or more of themselves to report as to the propriety of his detention (x). In the case of a private patient in a licensed house the visitors arrange for a like visit by the medical visitor alone or with the other visitors and if this visit results in any doubt as to the propriety of the detention the visitor reports in writing to the Commissioners who in their turn satisfy themselves by inquiry both as to such propriety and as to the expediency of reporting the case to the Lord Chancellor with a view to an inquisition (a)

or medical or  
other visitors

Report on  
single patient

On receipt of a similar report as to a single patient the Commissioners must arrange for a similar visit either by one or more of themselves or by a medical visitor for the district in which the patient resides. Should the latter course be adopted the person directed to visit must report to the Commissioners and has all the powers of a Commissioner (b)

Report on  
private  
patient in  
asylum or  
hospital

In the case of a private patient in an asylum or hospital the Commissioners on receipt of the report arrange for a visit by one or more of themselves to inquire and report as to the detention or

(r) 33 & 34 Vict c 5 s 26 The lunatic may be chargeable to any union or parish not necessarily to the one in which the workhouse is situated (Commissioners 17th Report p 3 18th Report p 73) The removal of patients to the workhouse does not affect their subsequent treatment removal discharge and chargeability or the rights of the guardians of the union or parish to which they are chargeable to take proceedings (see pp 492 *et seq ante*) for rendering their property (if any) available for their maintenance (Commissioners 21st Report p 32 22nd Report p 86 23rd Report p 92)

(s) See p 509 *ante*

(t) See p 471 *ante*

(u) Lunacy Act 1890 (53 & 54 Vict c 5) s 39 (1) (2)

(w) As to this jurisdiction see note (e) p 466 *ante*.

Lunacy Act 1890 (53 & 54 Vict c 5) s 39 (3)

*Ibid* 39

*Ibid* 39 (6)

the Commissioners may send a copy of the report to the clerk to the visiting or managing committee of the asylum or hospital respectively, and one or more of the committee must thereon visit the patient and report to the committee as to the propriety of the detention and the committee or any three of them may on consideration discharge the patient or give such directions as they think fit (c)

No special visit is necessary in cases where within one month from reception of a private patient the institution or house is visited by the Commissioners or visitors the patient then and there examined by them and a report made as to the propriety of his detention (d)

The Commissioners in any of the foregoing cases can discharge any patient whose case they think justifies a discharge (e) None of the above provisions applies to lunatics received under a removal order or to any lunatic so found by inquisition (f)

SECT 2  
Care and  
Treatment  
of Lunatics

Where no  
special visit  
required

Discharge by  
Com-  
missioners

#### SUB SECT 2 — *Medical Attendance*

**1077** A medical practitioner who has signed a certificate on which a reception order has been made is disqualified from being the regular professional attendant of the lunatic while detained under the order. Similarly a medical practitioner being a Commissioner or visitor is disqualified from professionally attending a patient in a hospital or licensed house unless directed to visit the patient in pursuance of his official duties as Commissioner or visitor (g)

Practitioners  
disqualified  
from attend-  
ance on  
patient

The Commissioners may direct how often a single patient is to be visited by a medical man but in the absence of any order one visit in every two weeks must be made by a medical practitioner not deriving and not having a partner father son or brother who derives any profit from the patient's charge. The medical attendant of any single patient may be discontinued and some other person employed in his place by direction of any two Commissioners. Any person having charge of a single patient who fails to carry out the Commissioners' directions under these provisions is guilty of a misdemeanour (h). These provisions do not apply to lunatics so found by inquisition (i).

Number of  
visits

The Commissioners may at any time require a special medical report as to any single patient from his medical attendant. This is additional to the requisite periodical reports and must be in such form and specify such particulars as the Commissioners direct (i).

Special  
medical  
reports

#### SUB SECT 3 — *Visits of Friends and Correspondence*

**1078** The Commissioners or visitors of licensed houses according to their respective jurisdictions may at any time give a written

Order for  
admission of  
relations  
friends etc.

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 39 (7)

(d) *Ibid* s 39 (8)

(e) *Ibid* s 39 (9)

(f) Lunacy Act 1891 (54 & 55 Vict c 65) s 8 see further as to visiting, pp 469 *et seq ante*

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 43

(h) *Ibid* s 44 For the penalty see p 528 *post*

(i) Lunacy Act 1890 (53 & 54 Vict c 5) s 45

**SECT 2**  
**Care and**  
**Treatment**  
**of Lunatics**

order for the admission of any relation or friend or any medical man desired by either of the latter to visit any patient anywhere within the limits of their authority (except in prison). Such an order may be limited to a single visit or may extend to a specified number of visits or be a general authority to visit at any reasonable time with or without restrictions as to an attendant's presence (*l*)

Penalty for  
non  
compliance

Failure to comply with the order on the part of the manager or principal officer renders him liable to a fine not exceeding £20 (*l*)

Letters

**1079** All letters written by any patient must be forwarded unopened by the manager of every institution for lunatics and by every person having charge of a single patient if addressed to the Lord Chancellor, judge in lunacy, Secretary of State, Commissioners, the person signing the reception order or the petitioner for such order, Chancery or any other visitor or the visiting committee. The forwarding of other letters is a matter of discretion. Any default involves liability to a penalty not exceeding £20 (*m*)

Notices to be  
posted up in  
institutions

**1080** Whenever the Commissioners so direct (*n*) printed notices must be posted up in every institution enabling every private patient to see them setting forth every such patient's right—

(1) to have any letter written by him forwarded as above mentioned

(2) to request a personal and private interview with a visiting Commissioner or visitor at any visit made to the institution

Any default in posting these notices or failure for ten days to comply with the Commissioners' directions as to their situation involves liability to a penalty not exceeding £20 (*o*)

**SUB SECT 4 Treatment**

Subjection to  
mechanical  
means of  
restraint

**1081** No lunatic must be subjected to mechanical means of restraint (which includes such instruments and appliances as the

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(*k*) Lunacy Act 1890 (53 & 54 Vict c 5) s 41. The Commissioners in Lunacy are anxious that subject to proper restrictions patients should be visited by relations and friends. At the same time by a circular addressed to superintendents of asylums and managers of licensed houses they draw attention to the subject of the execution of documents affecting lunatics' property. Whilst it is no part of their duty to determine the general question of the validity of documents so executed the Commissioners are of opinion that superintendents and managers ought not in any circumstances to permit or knowingly afford facility for but ought on the contrary to prevent the execution by persons of unsound mind in their charge of any document other than a will or codicil affecting their property or income. They except the case of a will or codicil because testamentary dispositions made during lucid intervals are held to be valid (see p 403 *ante*) and are always open to be contested before being rendered operative by probate. As to access by a solicitor to his client in an asylum to obtain an affidavit required by rules of court see *Re Petition for Judicial Separation Ex parte Beecham* [1901] P 61 where the above circular is set out.

(*l*) Lunacy Act 1890 (53 & 54 Vict c 5) s 47

(*m*) *Ibid* s 41

(*n*) By Order of 14th May 1890 these notices are directed to be put up in every institution for lunatics

(*o*) Lunacy Act, 1890 (53 & 54 Vict c 5) s 42

## PART XII —RECEPTION AND CARE OF LUNATICS AND IDIOTS

### SECT 2 Care and Treatment of Lunatics

Commissioners may from time to time determine (p) unless the restraint is necessary for surgical or medical treatment or for prevention of injury to himself or others (q) Should restraint of this kind be applied a medical certificate must forthwith be signed describing the means used and the ground on which the certificate is founded This certificate must be signed by the medical officer of the institution for lunatics or workhouse, or in the case of a single patient by his medical attendant A full record of every case of restraint by these means must be kept from day to day and a copy of the record and certificate sent quarterly to the Commissioners Where the patient is in a workhouse the record must be kept by the medical officer and the copies above mentioned forwarded by the clerk to the guardians Any contravention of these provisions is a misdemeanour (r)

**1082** All questions as to diet may be determined and regulated in the case of pauper lunatics in a hospital or licensed house by the visiting Commissioners and subject to the directions of the visiting Commissioners visitors of a licensed house have a like power as to that house (s)

**1083** No male person may be employed in the personal custody or restraint of any female patient in an institution for lunatics Violation of this rule renders the employer liable to a penalty not exceeding £20 An exception however is made in cases of urgency or necessity but the manager must report such employment to the Commissioners or visitors on their next visit (t)

**1084** Visiting guardians must once at least in each quarter enter in a book to be kept in the workhouse such observations as they think fit as to diet accommodation and treatment of any lunatics in the workhouse The book must be kept by the master and laid before the Commissioners when next visiting (u)

### SUB SECTION —Abolition of Trial or for Health or Change of Residence

**1085** Any two visitors of an asylum may with the medical officers written advice, permit a patient to be absent on trial so long as they think fit and in the case of a pauper an allowance

(p) Lunacy Act 1890 (53 & 54 Vict c 5) s 40 (6) By Regulations dated 17th April 1890 the Commissioners have defined at great length mechanical means of bodily restraint

(q) Lunacy Act 1890 (53 & 54 Vict c 5) s 40 (1) Restraint of a lunatic to prevent him from injuring himself or others is justifiable at common law (*Scott v Wakem* (1862) 31 & 38 *Brookshaw v Hopkins* (1811) 1 East 240 241) On the other hand restraint greater in degree more severe in character or longer in duration than necessary for the security and care of the lunatic is an offence at law punishable on indictment (*R v Roberts* (1853) *per* Lord CAMPBELL C.J. Commissioners 8th Report p 37)

(r) Lunacy Act 1890 (53 & 54 Vict c 5) s 40 (2) (3) (4) (5) (7) For the penalties see pp 528 529 *post*

(s) Lunacy Act, 1890 (53 & 54 Vict c 5), s 52 and see *vide* ss 187 (1) (g), 194 (1) (f) 270 (6) pp 411 450 *ante*

(a) Lunacy Act 1890 (53 & 54 Vict c 5) s. 53

(b) *Ibid* s 51 (1) (2)



## SECT 2

**Care and Treatment of Lunatics**

Absence to travel or on trial

not exceeding the charge in the asylum, may be made to him while so absent (c)

The manager of any hospital or licensed house may take or send under proper control any private patient to any specified place or to travel in England for the benefit of his health or permit such a patient to be absent on trial but only with the consent of a Commissioner or in the case of a hospital, of two members of its managing committee or in the case of a house licensed by justices of two of its visitors. Any such consent may be renewed and the place specified varied. Before this consent is given the written approval of the petitioner for the reception order or of the person making the last payment on account of the lunatic must be produced unless dispensed with by the respective consenting persons for cause shown (d)

Absence of pauper patient on trial

A Commissioner as regards any hospital or licensed house and two of the managing committee of a hospital and two of the visitors of a house licensed by justices may permit a pauper patient to be absent on trial for any period and may make or order an allowance to the pauper not exceeding the charge made for him in the hospital or house which shall be paid to him or for his benefit as the Commissioner or visitors direct (e)

Absence by leave of medical officer

The medical officer of a hospital or licensed house may permit any patient to be absent for a period not exceeding forty eight hours (f). If a person allowed to be absent on trial for any period does not return at the expiration thereof and a medical certificate certifying that his detention is no longer necessary is not sent to the visitors of the asylum or the manager of the hospital or house he may at any time within fourteen days after the expiration of the period of trial be retaken as in the case of an escape (g)

Change of residence of single patient

**1086** Any person having charge of a single patient may change his residence and remove him to any new residence of such person in England but before so doing he must give seven days notice thereof and of the new residence to the Commissioners and to the petitioner for the reception order or to the person making the last payment on account of the lunatic (h)

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 50 (1) (2). The regulations of an asylum may provide for the absence of a patient for not more than four days with the leave of the manager (*ibid* s 27a (5)). The medical officer's recommendation must accompany every application for leave of absence (Commissioners in Lunacy Rules 1895 r 21 (2)).

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 50 (3) (4) (5) as amended by Lunacy Act 1891 (54 & 55 Vict c 60) s 9.

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 50 (6) as amended by Lunacy Act 1891 (54 & 55 Vict c 60) s 9.

(f) Lunacy Act 1890 (53 & 54 Vict c 5) s 55 (1) as amended by Lunacy Act 1891 (54 & 55 Vict c 60) s 9. Absence on trial from an asylum under this provision will not amount to a break of residence so as to destroy the status of irremovability of a lunatic irremovable at the time of his admission (see p 491 *ante*) if the lunatic is not at the time of his release on leave capable of exercising an independent choice as to his place of residence (*R v Bruce* [1892] 2 Q B 136).

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 55 as amended by Lunacy Act 1891 (54 & 55 Vict c 60) s 9.

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 56 (1) (2).

Any person having charge of a single patient may with the previous consent of a Commissioner take or send the patient under proper control to any specified place for any definite time (i) for the benefit of his health or permit him to be absent on trial for such period as may be thought fit. The approval of the petitioner or of the person making the last payment on account of the lunatic must be produced to the Commissioner before his consent can be given unless dispensed with by him for cause shown (l)

SECT 2  
Care and  
Treatment  
of Lunatics  
Absence to  
travel or on  
trial

#### SUB SECT 6—Removal

**1087** Anyone having authority to order the discharge of a private patient from an institution for lunatics, or of any single patient may with the written consent of a Commissioner by order in writing direct removal of the patient to any institution or to the charge of any person named in the order (l)

Persons who  
may authorise  
removal

Any two Commissioners may order the transfer of a lunatic from one institution for lunatics to another (m) or from the charge of any person under whose care he is as a single patient to the charge of any other person or to any institution for lunatics (n). On the death of a person having charge of a single patient the Commissioners may on application by the person having authority to discharge or if no such application is made within seven days from the death on their own motion direct the lunatic's removal to the charge of some person to be named in the order (n)

Transfer by  
order of Com-  
missioners

**1088** Where the visiting committee of an asylum has made an order for delivery of a pauper therein to the custody of a relative or friend any two members of the committee may at any time if they think fit order his removal to the asylum (o)

Removal of  
pauper to  
asylum

Any two visitors of an asylum may order a pauper lunatic chargeable to any union within any county or borough to which the asylum wholly or in part belongs or to such county or to any county for the reception of whose pauper lunatics into that asylum there is a subsisting contract, to be removed to that asylum from any other institution for lunatics in which he may be detained (p)

(i) On a fresh application to the Commissioners the place originally specified may be altered or the time extended

(k) Lunacy Act 1890 (53 & 54 Vict c 5) s 56 (3) (4) Lunacy Act 1891 (54 & 55 Vict c 65) s 10

(l) Lunacy Act 1890 (53 & 54 Vict c 5) s 58 As to who can order a discharge see p 522 *post*

(m) Lunacy Act 1890 (53 & 54 Vict c 5) s 59 (1) (3) A medical report from the officer of the institution left is generally required (Commissioners in Lunacy Rules 1895 r 21)

(n) Lunacy Act 1890 (53 & 54 Vict c 5) s 59 (2)

(o) *Ibid* s 63

(p) *Ibid* s 64 These provisions do not extend to the removal of lunatics chargeable (1) to a borough not being a county borough (2) to a union within a county for the reception of whose pauper lunatics there is a subsisting contract. The clerk of every asylum the superintendent of every hospital and the resident licensee of every licensed house must within two clear days after the removal discharge death or transfer from the private to the pauper class or *vice versa* of any patient make entries in the register of patients and of removals discharges and deaths (Commissioners in Lunacy Rules 1895 r 22) and within the like time in the case of a private patient send notice to the

## SECT 2

Care and  
Treatment  
of LunaticsRemoval of  
pauper from  
asylum

**1089** Any two visitors of an asylum may order the removal of a pauper lunatic therein to some other institution for lunatics (*q*) But a lunatic must only be removed under this provision (except with the written consent of two Commissioners) to one of the following —

(1) an asylum within or belonging wholly or in any part to the county within which the asylum from which the lunatic is removed is situate or to the county in some parish of which the lunatic may have been adjudged to be settled,

(2) a hospital or licensed house within any such county, or

(3) an institution for lunatics into which the lunatic can be received under a subsisting contract (*r*)

Execution  
of order

The visitors ordering the removal of a pauper lunatic may by the order require any relieving officer or other officer of the union county or borough to which he is charged, able or may authorise any other person to execute the order (*s*)

Certificate of  
fitness for  
removal

No pauper lunatic may be removed under any removal order of two visitors without a medical certificate of the medical officer of the institution for lunatics from which the patient is to be removed certifying that he is in a fit condition of bodily health to be removed (*t*)

Removal from  
workhouse on  
order of Com-  
missioners

**1090** If any two or more Commissioners on visiting a workhouse consider that any lunatic or alleged lunatic therein is not a proper person to be allowed to remain there they may order his removal to an institution for lunatics Such order will have the same effect as a summary reception order (*u*) The guardians of the union to which the workhouse belongs have a right of appeal against such an order within one month to a Secretary of State who will thereupon send some person to visit the workhouse and report The decision of the Secretary of State on such report is conclusive (*v*)

Removal  
where union  
is in more  
than one  
county

Where a union is in more than one county and the workhouse of the union is in one county and the place from which a lunatic was sent to the workhouse is in another county, an order may be made by a justice for either county for the lunatic's removal to the asylum of either county notwithstanding that there may be an asylum of the county in which the workhouse is and there may not be a very special reason why the lunatic cannot be taken there (*b*)

Commissioners and in the case of a lunatic so found to the Chancery visitors (Commissioners in Lunacy Rules 1895 r 23)

(*g*) Before transferring a pauper lunatic from one county asylum to another in a different county it is essential that an order of adjudication of settlement should be obtained (see p 490 *ante*) and the union in which the lunatic is adjudicated to be settled must be notified so that it may have an opportunity of appealing

(*h*) Lunacy Act 1890 (33 & 34 Vict c 5) s 60

(*i*) *Ibid* s 66 As to entries and notices on removal see Commissioners in Lunacy Rules 1890 rr 22 & 23 and note (*p*) p 519 *ante*

(*j*) Lunacy Act 1890 (33 & 34 Vict c 5) s 67

(*k*) See p 505, *ante*

(*l*) Lunacy Act 1890 (33 & 34 Vict c 5) s 60

(*m*) *Ibid* s 68 An order sending a lunatic to the asylum of the county from which the lunatic was sent to the workhouse seems to require indorsement by a visitor of that asylum (*ibid* s 27 (*j*) and see p 508 *ante*) For

Except under the provisions last mentioned, a pauper lunatic must not be removed under a removal order to any institution for lunatics into which he could not have been received under a reception order (c)

SECT 2  
Care and  
Treatment  
of Lunatics

**1091** The authority liable for maintenance of a pauper lunatic in a hospital or licensed house may order his removal to the workhouse of the union to which he is chargeable or if he is chargeable to a county or borough, to the workhouse of the union from which he was sent to the hospital or licensed house and may direct the mode of removal (d)

Removal of  
pauper from  
hospital or  
licensed house  
to workhouse

Where a lunatic in a hospital or licensed house becomes a pauper the manager may after notice to the authority liable for maintenance apply to a justice for an order for removal of the lunatic to an institution to which pauper lunatics for whose maintenance the authority is liable may legally be sent. The original reception order continues in force and authorises the classification of the lunatic as pauper lunatic in the institution to which he is removed (e)

**1092** Every removal order both from institutions for lunatics and from private charge and any consent of Commissioners, must be in duplicate. One copy must be delivered to the manager of the institution or the person from whose care the lunatic is being removed and the other to the manager of the institution or the person into whose care the lunatic is removed. This order and consent where required a sufficient authority for the lunatic's removal and reception in accordance with it.

Orders etc.  
must be in  
duplicate

The manager of the institution from which or the person from whose care the lunatic is removed must deliver free of expense a copy of the reception order and documents accompanying it to the person executing the removal order and these must be delivered by him to the manager of the institution into which or to the person into whose charge the lunatic is removed and must be certified under the hand of the person whose duty it is to deliver them (f)

Delivery of  
copies of  
reception  
order etc

**1093** Where an alien is detained as a lunatic and his family or friends desire his removal to the country whose subject he is the Commissioners, upon application by any member of his family or by a friend may inquire and report to a Secretary of State, who may by warrant direct delivery of the alien to the person named in the warrant. Every such warrant must be obeyed by the person or authority under whose charge the lunatic is, and is a sufficient authority for the master of any vessel to receive and detain the lunatic on board and to convey him to his destination (g)

Removal of  
alien

\* the case where a union is situate in a county to which it does not belong see Lunacy Act 1891 (54 & 55 Vict c 60) s 6 and p 510 *ante*

(c) Lunacy Act 1890 (53 & 54 Vict c 5), s 69 see *ibid* s 27 and p 510, *ante*

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 61, as amended by Lunacy Act, 1891 (54 & 55 Vict c 60) s 11

(e) Lunacy Act 1891 (54 & 55 Vict c 65) s 19 (1)

(f) Lunacy Act 1890 (53 & 54 Vict c 5) s 70

(g) *Ibid*, s 71 It seems to be an offence against the common law forcibly

## EC1 2

## SUB SECT 7 —Discharge

Care and  
Treatment  
of LunaticsPerson to  
direct  
discharge

**1094** A private patient detained in an institution or under care as a single patient must be discharged if the petitioner for the reception order or his duly appointed substitute or directs in writing (*h*) Where such person is dead or by reason of his own lunacy absent from England or otherwise, incapable of signing such an order or where a patient originally classified as a pauper is afterwards classified as a private patient the person who made the last payment on his account or the husband or wife or if neither exist or either is incapable as aforesaid the father or in his place for a similar reason the mother or in her place for a like reason any one of the next of kin of the patient may give the direction for discharge If none of the persons so qualified to direct discharge exists or is able or willing to act the Commissioners may order discharge (*i*)

By authority  
liable for  
maintenance  
of pauper

**1095** The authority liable for the maintenance of a pauper lunatic in a hospital or licensed house may direct his discharge and the mode thereof and on production to the manager of a copy of the order he must forthwith discharge the patient or suffer him to be discharged (*l*)

Medical  
certificate  
preventing  
discharge

**1096** A patient must not be discharged under the provisions stated in the last two paragraphs if the medical officer or in the case of a single patient his medical attendant certifies with the grounds for his opinion that the patient is dangerous and unfit to be at large unless after production of such certificate two of the visitors of an asylum or the Commissioners visiting the hospital or house or the visitors of the house or one Commissioner in the case of a single patient in writing consent to such discharge (*l*)

By order of  
two or more  
Commissioners

**1097** Two Commissioners one medical and one legal may visit a patient detained in any hospital or licensed house or as a single patient and may within seven days if they think the detention is without sufficient cause direct his discharge (*m*)

Discharge on  
medical  
certificates

**1098** Anyone may apply to the Commissioners to have any person detained as a lunatic in an institution for lunatics or as a

to remove a British subject who has not been certified as a lunatic in this country to an asylum abroad with a view to certification there as a person of unsound mind or forcibly to remove from this country a person of unsound mind who has been so certified but not such an offence to induce by misrepresentation a person of unsound mind whether under certificate or not to leave this country with a view to placing such person in an asylum abroad though in the latter case an indictment might lie for a conspiracy by several persons to induce by misrepresentation a lunatic to go abroad with a view to having him confined in an asylum there (Commissioners 52nd Report p 53)

(*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 72 (1) As to a substitute see *ibid* s 48 and p 50 *ante* A letter directing the keeper of the asylum to discharge a patient as soon as you think it advisable is not an order of discharge (*Lowe v F* (1857) 36 W R 25 H L)

(*i*) Lunacy Act 1890 (53 & 54 Vict c 5) s 72 (2) (3)

(*k*) *Ibid* s 73

(*l*) *Ibid* s 74

(*m*) *Ibid* s 75

private patient examined by two doctors and if the doctors after two visits at an interval of at least seven days certify that the patient may without risk be discharged the Commissioners may order his discharge at the end of ten days (*n*)

SECT 2  
Care and  
Treatment  
of Lunatics

**1099** The Commissioners when they have ordered a discharge must serve the order on the manager of the institution where the patient is detained or upon the person having charge of the patient as a single patient. They must further in the case of a private patient, give notice thereof to the petitioner for the reception order or the person who made the last payment on account of the patient, and in the case of a pauper to the authority liable for maintenance. Anyone served with such order continuing to detain the patient after the appointed date for discharge is guilty of a misdemeanour (*o*)

Service and  
notice of order  
of Com-  
missioners

**1100** Any three visitors of an asylum may discharge any person detained therein whether recovered or not and any two such visitors on the written advice of the medical officer may discharge any person detained therein (*p*)

By three  
visitors of an  
asylum or  
two visitors  
(on medical  
advice)

If after two visits made at an interval of not less than seven days by two visitors (one being a medical practitioner) to a licensed house it appears to them that any patient is detained without sufficient cause they may make an order for his discharge. Seven days notice of the second visit must be given by post or by entry in the patient's book to the manager who must thereupon send by post a copy thereof in the case of a private patient to the petitioner for the reception order or the person making the last payment on the patient's behalf and in the case of a pauper to the authority liable for maintenance and to the clerk of the visitors of the house. If the medical officer offers to give an opinion on the patient's health the visitors must examine him before making an order. If they make the order against the medical officer's opinion they must at once send his statement to the clerk of the visitors. These provisions do not apply to lunatics so found by inquiry (*q*)

By two  
visitors (one  
medical) after  
two visits

**1101** When application is made to the visiting committee of an asylum by a relative or friend of a pauper lunatic therein requiring that he may be delivered over to the custody and care of such relative or friend any two visitors may if they think fit discharge the lunatic upon an undertaking from the relative or friend that the lunatic shall no longer be chargeable to any union county, or borough and shall be properly taken care of and prevented from injuring himself and others (*r*)

Delivery to  
custody of  
relative or  
friend of  
pauper

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 49. The Commissioners however have discretion to refuse a discharge notwithstanding production of the two medical certificates (*R v Lunacy Commissioners* [1897] 1 Q B 630)

(*o*) Lunacy Act 1890 (53 & 54 Vict c 5) s 76

(*p*) *Ibid* s 77

(*q*) *Ibid* s 78. Every order under these provisions must be signed by the visitors who make it (*ibid*)

(*r*) *Ibid* s 79. An application was made for a *habeas corpus* to obtain the release from an asylum of a person detained there as a pauper lunatic

## SECT 2

## Care and Treatment of Lunatics

Discharge of pauper by visitors of asylum

Notice required

Removal of pauper

By guardians

Documents to be furnished to discharged patient

**1102** When visitors of an asylum order the discharge of a pauper lunatic therein except on the application of a relative or friend they may when they think fit send a notice in writing signed by the clerk of the asylum of their intention to discharge to a relieving officer of the union or to the clerk of the local authority liable for maintenance. On receipt of this notice the relieving officer or clerk must have the lunatic on his discharge, forthwith removed to the workhouse of the union to which he is chargeable or if chargeable to a county or borough to the workhouse of the union from which he was sent to the asylum (s)

**1103** Guardians can discharge any lunatic detained in their workhouse (t)

**1104** The secretary to the Commissioners must on the discharge of anyone who considers himself to have been unjustly detained furnish him on request free of expense with a copy of the reception order and certificate on which he was confined. If the order was made on petition, he must also supply a copy of the petition and accompanying particulars (a)

SUB SECT 8—*Recovery and Death*

## Recovery

**1105** The manager of every hospital and licensed house and anyone having charge of a single patient must forthwith on his recovery send notice where the patient is not a pauper to the petitioner for the reception order or the person making the last payment on the patient's behalf and where the patient is a pauper to the guardians of his union and if a local authority is liable to the clerk of such local authority. The notice must state that unless removed within seven days the patient will be discharged. If not so removed he is to be forthwith discharged (l)

who was entitled to a pension and to a widow's pension of property worth about £1400. He had been placed in the asylum by guardians and his release was sought by his sister his only next of kin that he might be put under her care. The medical superintendent said that they had no power to release him until certain preliminary proceedings had been taken under the Lunacy Acts but it was decided that they could classify him under the Lunacy Act 1891 (54 & 55 Vict c 60) s 3 (see p 506 *ante*) as a private patient and then release him and the court (CAVENDISH and WRIGHT JJ) therefore directed the writ to go if he was not released within twenty-four hours holding that the medical officer ought to have communicated with the visiting committee on discovering the pecuniary position of the patient (*Re St. result* (1894) 29 L J 340). The importance of this decision lay not so much in its effect on the patient's position as regards accommodation and treatment as in his altered status with reference to discharge—a private patient being dischargeable under the Lunacy Act 1890 (53 & 54 Vict c 5) s 72 by the person who made the last payment for maintenance (or by various relatives or by the Commissioners) (see p 527 *ante*) a pauper under the Lunacy Act 1890 (53 & 54 Vict c 5) s 77, only on the orders of the visitors of the asylum (see p 522 *ante*) (Commissioners' 56th report p 9).

(s) Lunacy Act 1890 (53 & 54 Vict c 5) s 80

(t) *Ibid* s 81

(a) *Ibid* s 82. Anyone applying to the Commissioners *bona fide* or apparently *bona fide* on the lunatic's behalf ought to be supplied with these documents (*Re Dell* (1891) 91 L J 370)

(b) Lunacy Act, 1890 (53 & 54 Vict c 5) s 83

**1106** Every coroner must on receiving notice of the death of a lunatic within his district, if he considers that any reasonable suspicion attends the cause and circumstances of the death, summon a jury to inquire into the same (c)

**SECT 2**  
**Care and Treatment of Lunatics**

**SUB SECT 9 — Escape and Retaking**

**Death**

**1107** If any person lawfully detained as a lunatic escapes he may, without a fresh order or certificate be retaken at any time within fourteen days from his escape by the manager of the institution or master of the workhouse in which he was detained or any officer or servant thereof or by the person in whose charge he was as a single patient or by anyone authorised in writing by such manager, master or person (d)

**Persons authorised to retake possession**

**1108** If any person detained as a lunatic under lawful authority in England escapes into Scotland or Ireland notice thereof must be given to the Commissioners as soon as practicable who may by writing under their seal authorise an application by such person as they think fit to a justice having jurisdiction where the lunatic was so detained for a warrant authorising such person to retake the lunatic. The warrant is in Scotland or Ireland as well as in England sufficient *prima facie* evidence that the person stated therein to have escaped was detained as a lunatic and of the fact of his escape and is sufficient authority to a sheriff in Scotland or a justice in Ireland to countersign the same. Any warrant so countersigned may be executed in Scotland or Ireland by retaking and bringing the lunatic thence so that he may be restored to the custody whence he escaped (e). This warrant does not authorise the retaking of the lunatic after the expiration of the time during which he could have been retaken according to the law in force in the place where he was detained as a lunatic had he remained there after his escape (f)

**Escape to Scotland or Ireland**

**Warrant**

**Execution of warrant**

**SUB SECT 10 — Miscellaneous**

**1109** On a recommendation of the Commissioners (g) the Lord Chancellor may through a master in lunacy (h) require the petitioner for a reception order under which the lunatic is detained or other person prying for his maintenance or managing his property to forward to the Lord Chancellor a written statement containing particulars to the best of his knowledge of the lunatic's property

**Statement and inquiries as to lunatic's property**

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 81. As to notices of death of lunatics see Commissioners in Lunacy Rules 1890 r 27 see also title CROVINGS Vol VIII p 242

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 85. If the fourteen days have expired without recapture fresh proceedings must be taken e.g. on the ground that the lunatic is not under proper control or is wandering at large (see pp 505 508 ante). The retaking may be justified under an order and certificate in proper form although the person named therein is not in fact a lunatic (*Norris v Steel* (1819) 3 Exch 782)

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 86. Similar provisions applicable to escape from Scotland into England or Ireland and from Ireland into England or Scotland are contained in *ibid* ss 87 and 88 respectively

(f) Lunacy Act 1890 (53 & 54 Vict c 5) s 89

(g) For these officials see pp 414 466 ante.



**SECT 2**  
**Care and**  
**Treatment**  
**of Lunatics**

Application  
for particulars  
of detention

Search for  
returns

Residence of  
patients with  
single  
patients

and of its application The Commissioners may also themselves make inquiries as to a lunatic's property (*h*)

**1110** Application may be made to any Commissioner, or in the case of a licensed house to any visitor as to whether any particular patient is or has been within the last twelve months confined as a lunatic within their respective jurisdictions, and such Commissioner or visitor if he thinks fit, can order the secretary or clerk as the case may be to search the returns for such information If the patient is or has been so confined information both as to the place and the manager's name with dates of admission and discharge will so far as possible be given to the applicant on payment of a regulation fee not exceeding 7s (*i*)

**1111** The Commissioners if satisfied that it is desirable and for the lunatic's interest that one or more patients should reside in the same house with a single patient can so direct the terms and conditions being in all respects the same as if each of them was a single patient (*j*)

**SECT 3—Reception and Care of Idiots**

Non applica-  
tion of  
Lunacy Acts

**1112** The provisions of the Lunacy Acts (*k*) as to registration and regulation of hospitals asylums and licensed houses for lunatics reports treatment visitation and care of lunatics and books to be kept do not apply to hospitals institutions or licensed houses registered under the Idiots Act (*l*) or to any idiot or imbecile received therein

Requisites for  
reception

**1113** An idiot or imbecile from birth or from an early age (*m*) may whether under or over age be placed by his parents or guardians or by any person standing towards him *in loco parentis* in any hospital institution or licensed house (*n*) registered for the care education and training of idiots and imbeciles upon the certificate of a duly qualified medical practitioner that the person is an idiot or imbecile capable of receiving benefit from the institution, together with a statement signed by the parent or guardian or person *in loco parentis* (*o*) Any idiot or imbecile who has whilst under age been so placed as above may with the consent of the Commissioners be retained therein after he is of full age (*p*)

Discharge.

Any person of full age so retained may be discharged by the

(*h*) Lunacy Act 1890 (53 & 54 Vict c 5) s 50

(*i*) *Ibid* s 51 and see note (*a*) p 524 *ante*

(*j*) Lunacy Act 1890 (53 & 54 Vict c 5) s 64

(*k*) For these Acts see note (*l*) p 412 *ante*

(*l*) Idiots Act 1886 (49 & 50 Vict c 25) s 11

(*m*) These terms do not include lunatics (*ibid* s 17)

(*n*) This does not include a lunatic asylum (*ibid*)

(*o*) Idiots Act 1886 (49 & 50 Vict c 25) s 4 For forms of medical certificate and statement to accompany see *ibid* Schedule Forms 1 2

(*p*) Idiots Act 1886 (49 & 50 Vict c 25) s 5 Detention under the provisions of this Act will found jurisdiction to make administrative orders under the Lunacy Act 1890 (53 & 54 Vict c 5) s 116 (1) (*c*) (see p 428 *ante*) (*Re Whalley (Mark) and Re Whalley (W R)* [1906] 1 Ch 565 C A)

Commissioners, whose order must specify the reasons of such discharge and the date thereof (g)

Notice of the reception of any idiot or imbecile into a hospital institution or licensed house registered as aforesaid must be sent to the Commissioners within fourteen days by the superintendent or principal officer (i)

**1114** Notice of any idiot's or imbecile's death in or discharge from any hospital institution or licensed house registered as aforesaid must be sent forthwith by the superintendent or principal officer to the Commissioners (s)

**1115** Application must be made to the Commissioners to register every hospital institution or licensed house for the intended reception of idiots and imbeciles and until the certificate of registration is obtained any such reception therein is illegal (t)

The Commissioners must once in every twelve months visit and inspect every such registered house (u) where a medical journal in the form directed by them must be kept (a) They may also direct that a duly qualified medical man shall reside on the premises (b)

**1116** Nothing in the Idiots Act (c) is to deprive poor law guardians of the power (d) of sending pauper idiots or imbeciles to houses registered under the Act or from receiving in respect of such idiots or imbeciles such parliamentary grants (e) as may be made towards the maintenance and care of pauper lunatics as if such idiots and imbeciles were pauper lunatics (f)

### SECT 3 Reception and Care of Idiots

Notice of  
reception

Notice of  
death or  
discharge

Registration  
of places for  
reception

Visitation and  
inspection

Power of  
poor law  
guardians

## Part XIII — Penalties, Misdemeanours, and Proceedings

**1117** The following offences are misdemeanours (q) —

(1) detention of a lunatic or alleged lunatic in an institution otherwise than in accordance with the Lunacy Acts (h)

Offences  
being mis-  
demeanours

(q) Idiots Act 1886 (49 & 50 Vict c 20) s 6

(r) *Ibid* s 9 for form of the notice see *ibid* Schedule Form 3

(s) *Ibid* s 10

(t) *Ibid* s 7 Provision was made with regard to hospital institutions and licensed houses existing at the passing of the Act (*ibid* s 6) As to superannuation allowances to officers and servants see *ibid* s 16

(u) *Ibid* s 12

(a) *Ibid* s 13

(b) *Ibid* s 14

(c) 49 & 50 Vict c 20

(d) The power referred to is given by the Poor Law Amendment Act 1868 (31 & 32 Vict c 122) s 13

(e) As to such grants see Local Government Act 1888 (51 & 52 Vict c 41) s 24 (2) (f) and p 490 *ante*

(f) Idiots Act 1886 (49 & 50 Vict c 25) s 15

(g) In the absence of special provision the punishment for a misdemeanour is either imprisonment without hard labour or fine see title CRIMINAL LAW AND PROCEDURE Vol IX pp 410 411

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 315 (1) as to the Lunacy Acts see note (l) p 412 *ante*

**PART XIII**  
**Penalties**  
**etc**

(2) taking charge of boarding or lodging a lunatic or alleged lunatic in an unlicensed house for payment (i)

(3) reception or detention except under the provisions of the Lunacy Act 1890 (h) of two or more lunatics in any house other than an institution or workhouse (l)

(4) neglect on the part of the manager of a hospital or licensed house or any person having charge of a single patient to send to the Commissioners or others the prescribed notices on admission removal discharge or death of a lunatic (m)

(5) wilful misstatements of any material fact in (1) any petition, statement of particulars or reception order (11) any medical or other certificate or any report as to mental or bodily health (n)

(6) false entries made knowingly in any book statement or return required under the Lunacy Act 1890 (l) or Rules in Lunacy (o)

(7) omission by the manager of an institution or person having charge of a single patient (a) to send within the prescribed time to the coroner notice of death

(8) failure to comply with the Lunacy Act 1890 (b) or rules as to making returns or giving information in pursuance thereof to the Commissioners or others (b)

(9) obstruction of any Commissioner or Chancery or other visitor in the exercise of his statutory powers (c)

(10) obstruction of any person authorised by the Lord Chancellor or Secretary of State to visit any lunatic or inspect any institution

(i) Lunacy Act 1890 (33 & 34 Vict c 5) s 310 (1) Penalty not exceeding £50 It does not matter at all whether the fact of the boarders in unit is known to the defendant or not If the jury find that the boarder was in fact a lunatic the defendant must be convicted (*R v Irwin* (1895) 62 J P 409 *I v Bishop* (1890) 5 Q B D 209 C C P) The tendency seems to be towards holding that the offence is committed when persons capable of being dealt with under the Lunacy Act 1890 (33 & 34 Vict c 5) s 116 (1) (d) (see p 429 ante) are boarded or lodged for payment (compare *R v Shaw* (1868) 11 Cox C C 109 C C R) A medical man in 1908 was convicted and fined the maximum amount for aiding abetting counselling and procuring the commission of the offence see *R v Lascelles R v Hildrew* (1908) 72 J L (Journal) 120 A defendant who failed to forward copies of the order and medical certificates under which a lunatic was detained to the Commissioners was prosecuted for unlawfully detaining the lunatic On proof by the prosecution that no copies of the order and medical certificates had been received by the Commissioners that no entries were to be found in their books or registers of the receipt of such copies and that notice to produce the documents had been given to the defendant and had not been complied with it was held that there was evidence to go to the jury (*I v Harris* (1867) 10 Cox C C 511)

(l) 33 & 34 Vict c 5

(m) Lunacy Act 1890 (33 & 34 Vict c 5) s 310 (1) (3)

(n) *Ibid* s 316 In the case of a single patient a penalty not exceeding £50

(o) *Ibid* s 317 Prosecutions in either of these cases must be ordered by the Commissioners or by direction of the Attorney General or Director of Public Prosecutions (*ibid* s 317 (3))

(a) *Ibid* s 318 For form of indictment against a medical man for making false entries in the Medical Visitation Book see 5 Cox C C Appendix p 7

(i) Lunacy Act 1890 (33 & 34 Vict c 5) s 319

(b) *Ibid* s 320 Daily penalty so long as the default continues not exceeding £10 Cumulative penalties may be remitted by the court

(c) *Ibid* s 321 (1) Penalty not exceeding £50 For a conviction under the section see *R v Jones* (1894) cited in Commissioners 48th Report p 104

or gaol or place where any person represented to be a lunatic is confined or of any person authorised by the Commissioners to visit or inquire (d)

(11) ill-treatment or wilful neglect of a lunatic by the manager or any person employed in an institution or by any person having charge of a lunatic whether by contract or by relationship (e)

(12) assisting or conniving at the escape or attempted escape of a patient or the secretion of a patient (f)

(13) abuse of a female lunatic by a manager or employee in an institution criminal lunatic asylum or workhouse or by any person having charge of a single patient Consent is no defence (g)

**1118** In the absence of special provision proceedings for offences may be taken (1) by the secretary of the Commissioners on their order (2) by the clerk of visitors of a licensed house where the offence is within their jurisdiction (3) by the clerk of the visiting committee of an asylum where the offence is committed by any person employed therein but except as otherwise provided such proceedings can only be taken by order of the Commissioners or visitors having jurisdiction where the offence was committed or with the consent of the Attorney General or Solicitor General (h) A Secretary of State on the report of the Commissioners or visitors may direct the Attorney General to prosecute in the case of a misdemeanour (i)

By whom  
proceedings  
may be  
taken.

**1119** All penalties are recoverable summarily and are payable either to the secretary of the Commissioners the clerk of the peace the asylum treasurer or county or borough treasurer as the case may be (k)

Recovery of  
penalties

**1120** Appeals by any person aggrieved by any order of justices except adjudication or maintenance orders lie to quarter sessions (l)

Appeals

(d) Lunacy Act 1890 (53 & 54 Vict c 5) s 321 (2) Penalty in addition to any punishment to which the offender is otherwise subject for every offence not exceeding £20

(e) *Ibid* s 322 Penalty if indicted fine or imprisonment as both if summarily convicted not exceeding £50 nor less than £5 The Summary Jurisdiction Act 1849 (12 & 13 Vict c 19) s 4 empowers justices to mitigate a fine on a first offence but this power does not extend to fines imposed by an Act subsequent thereto (i.e. passed after 1st January 1849) expressly providing a minimum fine in the case of a first offence (*Osborn v Wood Brothers* [1897] 1 Q B 191 and see title MISDEMEANOUR) The minimum fine of £2 imposed by this provision can therefore be reduced in the case of a first offence On a prosecution for ill-treating a lunatic by neglecting him it is necessary to show that the defendant owes a duty to the lunatic and that his conduct has or might have occasioned actual injury (*h v Lidham* (1816) 8 Q B 909)

(f) Lunacy Act 1890 (53 & 54 Vict c 5) s 323 Penalty not exceeding £20 nor less than £2 and see title CRIMINAL LAW AND PROCEDURE Vol IX p 510

(g) Lunacy Act 1890 (53 & 54 Vict c 5) s 324 Penalty not exceeding two years' hard labour and see title CRIMINAL LAW AND PROCEDURE, Vol IX pp 613 614

(h) Lunacy Act 1890 (53 & 54 Vict c 5) s 325

(i) *Ibid* s 328.

(k) *Ibid* s 326

(l) *Ibid* s 327

**PART XIII****Penalties  
etc****Burden of  
proof**

**1121** In a prosecution for failure to send any prescribed document the burden of proof is on the defendant but the testimony of one witness proving that the document was in fact duly posted or delivered is conclusive. Where the question is as to whether a house is or is not a licensed house or registered hospital the burden of proof is on the defendant to prove its status by production of the licences or evidence of its being still in force (*m*)

**Proceedings  
against person  
acting under  
statutory  
powers**

**1122** Neither civil nor criminal proceedings can be taken against any person putting the Lunacy Act 1890 (*n*) in force either as petitioner for a reception order or as giving a medical certificate or as doing anything in pursuance of the Act if such person has acted in good faith and with reasonable care. Should any such proceedings be taken they may on summary application to the High Court be stayed if the judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care (*n*)

**Witnesses.**

**1123** The Commissioners or visitors of any licensed house may summon witnesses (*o*) and may pay the witnesses reasonable expenses of appearance and attendance (*p*)

(*m*) Lunacy Act 1890 (53 & 54 Vict c 5) s 29. As to staying a prosecution on the ground that the consent of the Commissioners had not been obtained before the prosecution was instituted see *L v Tynley* (1913) 5 Q B 345.

(*n*) Lunacy Act 1890 (53 & 54 Vict c 5) s 30. For actions stayed under the terms of this provision see *Steinson v Little* (1891) 29 L J 200. *Williams v Beaumont and Duke* (1894) 10 T L R 45. s 33 (A). *Hannood v Haddeney Union* (1895) 62 J P 22. A medical practitioner is not liable for signing a certificate in support of a reception order. But if not being satisfied with his own personal examination of the patient he signs without due care and without making due inquiries he is liable for the consequence which ensue and none the less because he acted bona fide (*Hul v Semple* (1867) 3 L & L 337). At common law a medical practitioner cannot justify the taking charge of and confining an individual whom he has never seen merely upon statements made by relations unless such statements satisfy him that his intervention is necessary to prevent the individual from doing immediate injury to himself or others (*Interdon v Burrows* (1830) 4 C & P 210). But restraint of a dangerous lunatic is justifiable both at the moment of the original danger and also until there is reasonable ground for believing that the original danger is over (*Scott v Wakem* (1862) 3 F & F 328 and see *Symy v Fraser* (1863) 3 F & F 859).

(*o*) Penalty for non appearance or refusal to be sworn not exceeding £50

(*p*) Lunacy Act 1890 (53 & 54 Vict c 5) s 332

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## MACHINERY

**See DISTRESS, FACTORIES AND SHOPS, RATES AND RATING**

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# MAGISTRATES

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| <i>Highways</i>  | HIGHWAYS STREETS AND PIEDGES   |
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| <i>Industrial Schools</i>  | EDUCATION  |
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NOTE.—For Criminal Law generally and the procedure upon inquiry into indictable offences, see title CRIMINAL LAW AND PROCEDURE Vol IX pp 229 *et seq* For particular offences triable summarily reference is directed to the titles throughout the work which deal with the subject matter of the offences.—Eds

## Part I—The Office of Magistrate. Appointment and Qualification

### SECT 1—Definition

#### SECT 1 Definition Magistrate

**1124** 'Magistrat' is the common denomination under which are included all those who are entrusted whether by commission or appointment or by virtue of their office with the conservation of the peace and the hearing and determination of charges in respect of offences against it

The name Justice was first given to the office in the year 1360 (a)

### SECT 2—History and Development of the Office

**1125** The duty of conservation of the peace lay in ancient times primarily with the holders of certain offices by virtue of appointment or election (b)

The right of appointing such persons was assumed by King Edward III (c) in 1327 and has since been exercised continuously by the Crown. In 1344 it was enacted that two or three of the best reputation in the Counties shall be assigned keepers of the Peace by the King's Commission and at what time need shall be the same with other wise and learned in the law shall be assigned by the King's Commission to hear and determine felonies and trespasses done against the peace in the same counties and to inflict punishment reasonably according to [law and reason and] the manner of the deed (d)

Other statutes followed by which the number and authority of justices were regulated (e) and in 1535 it was again enacted that no

Origin of  
office

Right of  
appointment  
assumed by  
Crown

Number and  
authority of  
justices  
regulated

(a) Stat (1360 1) 34 Edw 3 c 1

(b) Some of these were appointed by the King while others were elected by the people and the limits of their authority varied according to the nature of their office. Thus the Lord Chancellor the Lord Steward the Lord Marshal and the justices of the King's Bench were conservators of the peace of the whole kingdom. Other judicial officers were peace conservators within narrower limits justices of the Common Pleas and barons of the Exchequer within the limits of their courts justices of assize and gaol delivery within the limits of their commission. Of elected officers sheriffs and coroners were peace conservators within the limits of their counties and constables headboroughs tithing men and borsholders within the limits of their township or hundred. In addition to these other persons who did not hold any office were elected by the general body of freeholders of each county to act as peace conservators for that county (Lambard Eirenarcha (ed 1619) 16)

(c) Stat (1326 7) 1 Edw 3 stat 2 s 16. The King will that in every county good men and lawful which be no maintainers of evil [or] barritors in the county shall be assigned to keep the peace and see

1 Bl Com 349 *et seq*

(d) Stat (1344) 18 Edw 3 stat 2 c 2

(e) Stat (1360) 34 Edw 3 c 1 further defined their duties and by stat (1388) 12 Ric 2 c 10 it was provided that there should be six justices in each county and that they should sit once a quarter. By stat (1390) 14 Ric 2 c 11 eight justices were provided for and payment for their services allowed. By stat (1403 4) 5 Hen 4 c 10

**SECT 2**  
**History and**  
**Develop**  
**ment of**  
**the Office**

Appointment  
in boroughs  
and in  
London

Right of  
appointment  
cannot be  
delegated

person or persons, of what estate, degree, or condition soever they be, should have any power or authority to make justices of the peace but that all such offices should be made by letters patent under the King's Great Seal in the name and by the authority of the King and his heirs (*f*)

**1126** In boroughs the practice to make the mayor and aldermen justices by grant or charter (*g*) was superseded in 1835 (*h*) when it was provided that the Crown should assign justice to a commission of the peace and that the justices should sit under that commission only. In the City of London alone the Lord Mayor and aldermen have the prescriptive right of acting as justices of the peace (*i*)

The right of appointment which has thus been vested in the Crown cannot, without legislation directed to that end be delegated to any other authority (*j*)

**SECT 3—The Commission of the Peace**

The com  
mission

**1127** Apart from the case of the City of London (*l*) and with the addition of those who have been authorised by statute to act as justices by virtue of their office (*l*) the justices of the peace consist now of such persons as are assigned by the Crown to the commission of the peace. Their names are enrolled in a document prepared by the Clerk of the Crown in Chancery issued by the Crown under the Great Seal (*m*) and setting out the authority conferred upon them (*n*)

Separate  
commissions

A separate commission is issued for each county or riding, of

they were directed to imprison no one except in the common gaol. By stat (1414) 2 Hen 5 stat 1 c 4 justices were obliged to be resident in their counties and this was confirmed by another statute of the same year stat (1414) 2 Hen 5 stat 2 c 1. In 1487 it was enacted that justices taking recognisances must report the same (stat (1487) 3 Hen 7 c 2) and that they might admit prisoners to bail (*ibid* c 3).

(*f*) Stat (1535-6) 27 Hen 8 c 24 s 2 and see further title CONSTITUTIONAL LAW Vol VI pp 399 *et seq*

(*g*) This custom was recognised by stats (1439) 18 Hen 6 c 11 and (1535-6) 27 Hen 8 c 24 s 6

(*h*) Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) now repealed and replaced by the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 260

(*i*) Royal Charter of 1742 and see p 575 *post* and title METROPOLIS  
(*j*) *Jones v Williams* (1925) 3 B & C 762 *per* BAYLEY J at p 767  
*Arnold v Gausser* (1863) 8 Exch 463

(*k*) See p 575 *post*

(*l*) See p 537 *post*

(*m*) Crown Office Act 1877 (40 & 41 Vict c 41) s 5 (1)

(*n*) The form of document now used was settled by Order in Council in 1878 under powers conferred by the Crown Office Act 1877 (40 & 41 Vict c 41) (Stat R & O Rev Vol II Clerk of the Crown in Chancery pp 9 *et seq*). The original form of commission was revised in 1590 and the revised form with very slight alteration remained in use till 1878. It may be found set out in 3 Burn's Justice of the Peace (1845 ed) 988. Formerly certain selected justices were said to be of the quorum and the presence of one of them was necessary to the valid holding of quarter or general sessions. The present form of commission omits all reference to the quorum. See further title CONSTITUTIONAL LAW Vol VII p 13 note (*h*) COURTS Vol IX p 82

a county (o), and for each borough entitled thereto (p), the form of the document for a county differing somewhat from that for a borough (q)

SECT 3  
The Commission of the Peace

A new commission of the peace may be issued by the Crown at any time (r) but is not required even upon a demise of the Crown (s). The names of newly appointed justices are added to the commission by the Clerk of the Crown in Chancery to whom clerks of the peace in counties and town clerks in boroughs must send a statement in January of each year containing the names of all justices assigned to the commission of the peace for their counties or boroughs who have qualified and, so far as they know, of those who have died during the preceding year (t).

New commission

Annual return

#### SECT 4—*Justices ex officio*

**1128** In every commission of the peace for a county the following persons named—the Lord Chancellor (u) and Lord President of the Council (v) Lord Privy Seal (w) and other members of the Privy Council (x) the *Custos Rotulorum* for the particular county (x) the Lord Chief Justice the Master of the Rolls the lords justices of the Court of Appeal the justices of the High Court of Justice (y) and the Attorney General (a) and Solicitor General (b)

Persons named in every commission

(o) The North East and West Ridings of Yorkshire have always had a separate commission of the peace as also have the parts of Lincolnshire—Kesteven Lindsey and Holland—and the Isle of Ely and the Soke of Pembrokeshire also have separate commissions see *R v Isle of Ely (Inhabitants)* (1850) 15 Q B 827

(p) For a list of the boroughs having a separate commission of the peace see note (f) p 540 *post*. The number may from time to time be increased as the Crown may grant any borough a separate commission on its council making application for one (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 162).

(q) The reason is that in counties two assignments are required one for the justices as peace conservators the other to give them jurisdiction at quarter sessions (see p 563 *post*). In the case of borough justices (see p 540 *post*) the second assignment is not needed as they may not act as justices at any court of general delivery or quarter sessions (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 158 (1)).

(r) Compare the Justices Qualification Act 1760 (1 Geo 3 c 13) s 1. As to the effect of a new commission upon tenure of office see p 549 *post*.

(s) Demise of the Crown Act 1901 (1 Edw 7 c 5) s 1 (1). Upon his accession His late Majesty King Edward VII by letters patent dated 15th February 1901 appointed and declared that the several commissions of the peace issued by her late Majesty Queen Victoria for the several counties boroughs and places mentioned in the same should continue to be of full force and effect and that the persons thereby assigned or hereafter added should be His Majesty's justices of the peace. Before 1901 justices continued to hold office for six months after the demise of the Crown under stat (1702) 1 Ann c 2 s 5 and see title CONSTITUTIONAL LAW Vol VI pp 384 385 and see also p 549 *post*.

(t) Rules made under the Crown Office Act 1877 (40 & 41 Vict c 41) (Stat R & O Rev Vol II Clerk of the Crown in Chancery p 16) r 2.

(u) As to whom see title CONSTITUTIONAL LAW Vol VII pp 55—65.

(v) See *ibid* pp 51—53.

(w) See *ibid* p 65.

(x) See p 624 *post*.

(y) See title COURTS Vol IX pp 60—64.

(a) See title CONSTITUTIONAL LAW Vol VII p 74.

(b) *Ibid*.

## SECT 4

Justices  
ex officioChairmen  
of local  
authoritiesMayor of  
borough

**1129** The chairman of a county council is a justice of the peace for his county (c), and the chairman of a district council, whether rural or urban, unless personally disqualified by any Act, is a justice of the peace for the county of which the district forms part (d)

The mayor of a borough is a justice of the peace for the borough during his year of office, and for the next succeeding year also, unless he would in that year be disqualified to hold the office of mayor (e). But a woman who becomes chairman of a county or district council or mayor of a borough, is not thereby entitled to act as a justice (f)

Recorder  
Stipendiary  
magistrate

The recorder of a borough having a separate commission of the peace is a justice of the borough (g) and a stipendiary magistrate is a justice for the borough to which he is appointed (h). The chief magistrate of the Metropolitan Police Court at Bow Street becomes a justice of the peace for the county of Berks upon his name being inserted in the commission for that county (i)

Judge of  
county court

The judge of a county court may be included in the commission of the peace of the county or borough where the court is situated (j)

Ecclesiastical  
persons

**1130** Certain ecclesiastical persons have a right by statute to act as justices in their counties. Thus the Archbishop of York and his temporal chancellor are justices for the shire of Hexham (l) the Bishop of Durham and his temporal chancellor for the county of Durham (l) and the Bishop of Ely and his temporal steward for the Isle of Ely (m). The Vice Chancellor of the University of Cambridge for the time being may be assigned as a justice of the borough of Cambridge (n)

## SECT 5—County Justices

## SUB SECT 1—Appointment and Qualification

Practice on  
appointment

**1131** Justices of the peace for the counties are assigned on the nomination of the Lord Chancellor who may select them either

(c) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (5) (b) and see title LOCAL GOVERNMENT p 342 *ante*

(d) Local Government Act 1894 (56 & 57 Vict c 73) s 22 and see title LOCAL GOVERNMENT pp 262 330 *ante*. The phrase unless personally disqualified by any Act appears to refer to the disqualification of solicitors to be appointed justices in any county where they practised imposed by the Justices Qualification Act 1871 (34 & 35 Vict c 18) but now repealed by the Justices of the Peace Act 1906 (6 Edw 7 c 16) see p 551 *post*

(e) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 155 (1) and see title LOCAL GOVERNMENT p 309 *ante*

(f) Qualification of Women (County and Borough Councils) Act 1907 (7 Edw 7 c 33) s 1 (1). See title LOCAL GOVERNMENT pp 262 330 *ante*

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 163 (1)

(3) As to such boroughs see note (f) p 540 *post*

(h) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (3) and as to such magistrates see p 545 *post*

(i) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 31 but he has no powers other than those of a county justice in such circumstances

(j) County Courts Act 1888 (51 & 52 Vict c 43) s 17 see the Justices of the Peace Act 1906 (6 Edw 7 c 16) ss 1 5 (2) and Schedule

(k) Stat (1535 6) 27 Hen 8 c 24 s 22

(l) *Ibid* s 21

(m) *Ibid* s 20

(n) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 249

## PART I—OFFICE APPOINTMENT AND QUALIFICATION

upon his own responsibility or upon the recommendation of the lords lieutenant of the counties or of other persons. It was the custom during the last century to make the great majority of selections from the names recommended by the Lords Lieutenant<sup>(o)</sup> but advisory committees have recently been appointed for the various counties by the Lords Lieutenant with the approval of the Lord Chancellor and charged with the duty of recommending suitable persons<sup>(p)</sup>. Formerly a property qualification was required<sup>(q)</sup>, but this is no longer the case<sup>(r)</sup>. Any person who resides within a county or within seven miles of it is eligible as a justice of that county if not personally disqualified<sup>(s)</sup>.

§ 201  
County  
Justices

### SUB SECT 2—Oaths of Office

**1132** As soon as may be after accepting office and before exercising his powers a newly appointed justice is required to take the oath of allegiance and judicial oath<sup>(t)</sup>. These oaths may be taken before the Lord Chancellor or in open court before one or more judges in the King's Bench or Chancery Division of the High Court or in open court at the general or quarter sessions of the peace for the county in which the newly appointed justice of the peace is to act<sup>(a)</sup>. How taken

<sup>(o)</sup> This custom is certainly 100 years old and I think it is not more than 150 years old. I think very likely the custom originated from the Lord Chancellor asking assistance of the Lords Lieutenant because of his inability to overtake the work in all the counties of Great Britain without local knowledge. From this practice there appears to have grown up in some quarters an impression that the Lords Lieutenant are the only persons to be heard upon the subject and many Lord Chancellors have confined themselves to acting solely upon the recommendation of the Lord Lieutenant but this has certainly not been universal (evidence of Lord LOREBURN I C before the Royal Commission on the Appointment of Justices 1910 *Times* 3rd March p 6). In some cases the Lord Chancellor has even acted in opposition to the recommendation of the Lord Lieutenant. A resolution of the House of Commons in 1893 was passed that in the opinion of this House it is expedient that the appointment of County Magistrates should no longer be made by the Lord Chancellor of Great Britain and Ireland for the time being only on the recommendation of the Lords Lieutenant see title CONSTITUTIONAL LAW Vol VII p 61.

<sup>(p)</sup> This has been done in accordance with the recommendations in the Report of the Royal Commission dated September 1910.

<sup>(q)</sup> See the Justices Qualification Acts 1731 (5 Geo 2 c 18) 1744 (18 Geo 2 c 20) and 1870 (38 & 39 Vict c 54) all of which are repealed by the Justices of the Peace Act 1906 (6 Edw 7 c 16) s 5(2) and Schedule.

<sup>(r)</sup> *Ibid* s 1.

<sup>(s)</sup> *Ibid* s 2. As to the method of calculating the distance see Interpretation Act 1889 (52 & 53 Vict c 63) s 34 title STATUTES compare Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 231 and see note <sup>(h)</sup> p 543 *post*. As to disqualifications see p 550 *post*.

<sup>(t)</sup> Promissory Oaths Act 1868 (31 & 32 Vict c 72) s 6. For forms of the oaths see *ibid* ss 2 and 4 respectively. As to affirmation in lieu of oath see title EVIDENCE Vol XIII pp 520 *et seq*. Formerly an oath as to qualification was also required (Justices Qualification Act 1744 (18 Geo 2 c 20)) but this is no longer the case see note <sup>(r)</sup> *supra*.

<sup>(a)</sup> Promissory Oaths Act 1871 (34 & 35 Vict c 48) s 2. The fee to be paid by county justices other than justices *ex officio* under any Act of Parliament on qualifying as such (to include oaths Crown Office fee correspondence and every other expense connected therewith) is £2. The fee to be paid on administering the oath of office to a justice *ex officio*

**SECT 5**  
**County**  
**Justices**

Oaths of  
chairmen  
of local  
authorities

The chairman of a county or district council before acting as a justice is required to take the same oaths as a county justice unless he has already done so (b) The former must take the oaths in the same manner as a county justice<sup>1</sup> but the chairman of a district council may take them before any two justices of the peace for the county in which the district is situate sitting in petty sessions (c) and if he has been re-elected to that office on the expiration or other determination of a previous term of office he is not required to take the oaths again (d)

*SUB SECT 3 — Precedence*

Precedence

**1133** Subject to any established rule or custom affecting a particular bench precedence among county justices should be determined by seniority according to the order of the names on the commission of the peace (e)

**SECT 6 — Borough Justices**

*SUB SECT 1 — Classification of Boroughs*

Classification  
of boroughs

**1134** Boroughs outside the metropolis are divisible into three classes those which have a separate commission of the peace those which have also a separate court of quarter sessions and those which have neither (f)

under any Act of Parliament on qualifying as such and to all other persons is 5s (Letter of Secretary of State July 1894) When the oaths are taken at quarter sessions it has been customary for the clerk of the peace to charge a separate fee which varies in different counties but except in so far as the fee above authorised is concerned this is merely an honorarium which cannot be recovered at law (*Maule v White Maule v Herbert Maule v Green* (1896) 60 J I 567 (county court) see 71 J I (Journal) 519)

(b) Local Government Act 1888 (51 & 52 Vict c 41) s 2 (5) (b) Local Government Act 1894 (56 & 57 Vict c 73) s 22 The fee for administering the oath is 5s see note (a) p 559 *ante* As to the offices of chairmen of rural districts urban districts and county councils see title LOCAL GOVERNMENT pp 262 330 311 *ante*

(c) This is so by special permission of the Crown (Secretary of State's Circular to Chairmen of District Councils 20th February 1895 B 17111 (23) see 59 J P (Journal) 185) The fee to be charged by the clerk to the justices for administering the oath should be the same as the fee for administering an oath in any kind of business according to the table of justices clerks fees for the time being in force (Advice of Secretary of State 12th March 1895 see 59 J I 185 and 71 J P (Journal) 519)

(d) Chairmen of District Councils Act 1896 (59 & 60 Vict c 22) s 1 If however there were an interval between the two occasions on which he filled the office he would be required to take the oaths again and so it would seem would a chairman of a county council who was only a justice of the peace by virtue of his office There is some doubt whether a chairman of a county or district council who after the expiration of his term of office is permanently assigned to the commission of the peace need take the oaths again but it is safer for him to do so

(e) Home Office Circular 16th October 1907

(f) See title LOCAL GOVERNMENT pp 300 301 *ante* Certain boroughs are denominated counties of a city or counties of a town and have the right to appoint a sheriff (see Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 170 Sheriffs Act 1887 (50 & 51 Vict c 55) s 36) They are Bewick upon Tyne Bristol Canterbury Carmarthen Chester Exeter Gloucester Haverfordwest Kingston upon Hull Lichfield Lincoln Newcastle upon Tyne Norwich Nottingham Poole Southampton Worcester and York Of these Haverfordwest is a county by Act of Parliament

SECT 6  
Borough  
Justices

(stat (1542 3) 34 & 35 Hen 8 c 26 s 61) and has a Lord Lieutenant *Custos Rotulorum* and court of quarter sessions similar to that of other counties. Boroughs which are county boroughs i.e. boroughs having more than 50 000 inhabitants (see title LOCAL GOVERNMENT p 300 *ante*) either maintain their own quarter sessions or where they have not a separate court contribute an amount fixed by agreement or arbitration and raised by their own rates towards the costs of the sessions of the county in which they are deemed to be (see Local Government Act 1888 (51 & 52 Vict c 41) Sched III and generally as to adjustment of finances between such boroughs and the county see title LOCAL GOVERNMENT p 303 *ante*). Boroughs with more than 10 000 inhabitants are assessed to the county rate (see *ibid* p 350 *ante*) for the purpose of costs of assizes and quarter sessions which are payable out of the county fund (Local Government Act 1888 (51 & 52 Vict c 41) s 35 (5)) but may raise their own rate for their own sessions and are *pro tanto* exempt from contribution to the expenses of county sessions if they have a separate court of quarter sessions (*hæ parte Kent County Council and Dover Council* [1891] 1 Q B 389). Boroughs with less than 10 000 inhabitants are assessable to county rates for all purposes and the expenses of their sessions (if any) are not payable out of the county fund (Local Government Act 1888 (51 & 52 Vict c 41) ss 35—38) see *Thetford Corporation v Norfolk County Council* [1898] 2 Q B 468 C A. The Cinque Ports and two ancient towns namely Dover Hastings Hythe Romney Sandwich Rye and Winchelsea together with their members and liberties enjoy a separate commission of the peace the justices assigned to which have jurisdiction out of sessions throughout the places named. With the exception of Romney and Winchelsea each town has a separate court of quarter sessions with a recorder and clerk of the peace and with jurisdiction in its own borough and in such other parts of the area covered by the commission of the peace of the Cinque Ports as have not a separate court of quarter sessions (Cinque Ports Act 1811 (51 Geo 3 c 36) ss 1—4. Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 248). The administrative duties of quarter sessions in the Cinque Ports have been transferred to the Kent County Council (Local Government Act 1888 (51 & 52 Vict c 41) s 48 (4)). See further titles COURTS Vol IX p 127 LOCAL GOVERNMENT pp 299 *et seq* 303 *et seq* *ante*. The following is a list of the boroughs having a separate commission of the peace those with the addition of the letters Q S having also a separate court of quarter sessions —

|                    |                    |                    |
|--------------------|--------------------|--------------------|
| Aberavon           | Boston             | (Litheroe          |
| Aberystwith        | Bournemouth (Q S)  | Colchester (Q S)   |
| Abingdon (Q S)     | Bridford (Q S)     | Colne              |
| Accrington         | Brecon             | (Congleton         |
| Andover (Q S)      | Bridgnorth (Q S)   | Coventry           |
| Ashton under Lyne  | Bridgewater (Q S)  | (Crewe             |
| Banbury (Q S)      | Bridport           | (Dorset (Q S)      |
| Barnsley           | Brighton           | Darlington         |
| Barnstaple (Q S)   | Brighton (Q S)     | Dartmouth          |
| Barrow in Furness  | Bristol (Q S)      | Darwen             |
| Basingstoke        | Buckingham         | Deal (Q S)         |
| Bath (Q S)         | Bury (Q S)         | Denbigh            |
| Batley             | Buryton upon Trent | Derby (Q S)        |
| Pedford (Q S)      | Bury               | Devizes (Q S)      |
| Berwick upon Tweed | Bury St Edmunds    | Devonport (Q S)    |
| (Q S)              | (Q S)              | Dewsbury           |
| Beverley           | Cambridge (Q S)    | Doncaster (Q S)    |
| Bewdley            | Canterbury (Q S)   | Dorchester         |
| Bidford (Q S)      | Cardiff (Q S)      | Dover (Q S) Cinque |
| Birkenhead (Q S)   | Cardigan           | Port               |
| Birmingham (Q S)   | Carlisle (Q S)     | Droitwich          |
| Blackburn (Q S)    | Carmarthen (Q S)   | Dudley (Q S)       |
| Blackpool          | Carnarvon          | Dunstable          |
| Bodmin             | Chester (Q S)      | Durham             |
| Bolton (Q S)       | Chesterfield       | Eastbourne         |
| Bootle cum Linacre | Chichester (Q S)   | East Ham           |



SECT 6  
Borough  
Justices

|                    |                      |                     |
|--------------------|----------------------|---------------------|
| Eccles             | Maldon (Q S)         | Sheffield (Q S)     |
| Evesham            | Manchester (Q S)     | Shrewsbury (Q S)    |
| Exeter (Q S)       | Mansfield            | Smethwick           |
| Eye                | Maigitt (Q S)        | Southampton (Q S)   |
| Falmouth           | Marlborough          | Southend on Sea     |
| Faversham (Q S)    | Merthyr Tydfil (Q S) | South Molton (Q S)  |
| Flint              | Middlesbrough        | Southport           |
| Folkestone (Q S)   | Middleton            | South Shields       |
| Gateshead          | Monmouth             | Southwold           |
| Glossop            | Morley               | Stafford            |
| Gloucester (Q S)   | Mossley              | Staleybridge        |
| Godalming          | Neith                | Stamford (Q S)      |
| Grantham (Q S)     | Nelson               | Stockport           |
| Gravesend (Q S)    | Newark (Q S)         | Stockton            |
| Grimsby (Q S)      | Newbury (Q S)        | Stoke upon Trent    |
| Guildford (Q S)    | Newcastle under      | (Q S)               |
| Halifax            | Lyme (Q S)           | Stratford upon Avon |
| Haringate          | Newcastle upon Tyne  | Sudbury (Q S)       |
| Hartlepool         | (Q S)                | Sunderland (Q S)    |
| Hatfield           | Newport (Isle of     | Sutton Coldfield    |
| Hastings (Q S)     | Wight)               | Swansea (Q S)       |
| Cinque Port        | Newport (Monmouth)   | Swindon             |
| Haverfordwest      | New Romney           | Lymworth            |
| Helston            | Northampton (Q S)    | Taunton             |
| Henley on Thames   | Norwich (Q S)        | Fenby               |
| Hereford (Q S)     | Nottingham (Q S)     | Tenterden (Q S)     |
| Hertford           | Oldham (Q S)         | Lewkesbury (Q S)    |
| Heywood            | Ossett               | Phetford (Q S)      |
| High Wycombe       | Oswestry (Q S)       | Tiverton (Q S)      |
| Hove               | Oxford (Q S)         | Forquay             |
| Huddersfield (Q S) | Pembroke             | Lorrington (Great)  |
| Hull (Q S)         | Pennryn              | Totnes              |
| Hyde               | Penzance (Q S)       | Truro               |
| Hythe (Q S) Cinque | Illymouth (Q S)      | Lynmouth            |
| Port               | Pontefract (Q S)     | Wakefield           |
| Ipswich (Q S)      | Poole (Q S)          | Wallingford         |
| Jarrow on Tyne     | Portsmouth (Q S)     | Walsall (Q S)       |
| Keighley           | Preston              | Warrington (Q S)    |
| Kendal             | Ramsgate             | Warwick (Q S)       |
| Kidderminster      | Reading (Q S)        | Wednesbury          |
| King's Lynn (Q S)  | Peigate              | Wells (Somerset)    |
| Kingston on Thames | Retford (Q S)        | Welshpool           |
| Lancaster          | Richmond (Surrey)    | Wenlock (Q S)       |
| Leamington         | Richmond (Yorks)     | West Bromwich       |
| Leeds (Q S)        | (Q S)                | (Q S)               |
| Leicester (Q S)    | Ripon                | West Ham (Q S)      |
| Leigh              | Rochdale             | West Hartlepool     |
| Leominster         | Rochester (Q S)      | Weymouth            |
| Lichfield (Q S)    | Rotherham (Q S)      | Wigan (Q S)         |
| Lincoln (Q S)      | Ryde                 | Winchester (Q S)    |
| Liskeard           | Rye (Q S) Cinque     | Windsor (Q S)       |
| Liverpool (Q S)    | Port                 | Wisbech             |
| Louth              | Saffron Walden (Q S) | Wolverhampton       |
| Ludlow (Q S)       | St Albans            | (Q S)               |
| Luton              | St Helens            | Worcester (Q S)     |
| Lydd               | St Ives (Cornwall)   | Wrexham             |
| Lyme Regis         | Salford (Q S)        | Larmouth (Great)    |
| Lymington          | Salisbury (Q S)      | (Q S)               |
| Macclesfield       | Sandwich (Q S)       | Yeovil              |
| Maidenhead         | Cinque Port          | York (Q S)          |
| Maidstone (Q S)    | Scarborough (Q S)    |                     |

As from 1st November 1911 Aston Manor is merged in Birmingham  
(Local Government Board Provisional Order (1910) Confirmation (No 13)  
Act, 1911 (1 & 2 Geo 5 c xxxvi))

SUB SECT 2—*Appointment and Qualification*

SECT 6

Borough  
JusticesMethod of  
appointment

Qualification

**1135** In all classes of boroughs the method of appointment of justices is the same they are assigned by the Crown on the nomination of the Lord Chancellor who may in his discretion adopt recommendations made to him by the borough council

The only qualification required is that the prospective justice should reside in the borough (g) or within seven miles of it or occupy a house warehouse or other property within it (h)

SUB SECT 3—*Oaths of Office*Oaths of  
office

**1136** A newly appointed justice before acting as such must take the oath of allegiance and the judicial oath (i) which he may do in the same manner as a county justice (h) or if he prefers before the mayor and he must make a declaration before the mayor (l) or two other members of the borough council (m) The mayor may take the oaths before two justices of the borough or, where there are no justices before two councillors (n)

SUB SECT 4—*Precedence*

Precedence

**1137** In every borough having a separate commission of the peace the mayor takes precedence over all other justices acting in and for the borough and is entitled to take the chair at all meetings of the justices held in the borough at which he is present by virtue of his office as mayor (o) but he does not take precedence of county justices except

(g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 157 (3)

(h) *Ibid* The seven miles are to be computed by measuring in a straight line on a horizontal plane for which the use of the ordnance survey maps is authorised (*ibid* s 231) compare the Interpretation Act 1889 (52 & 53 Vict c 63) s 34 and title LOCAL GOVERNMENT p 303 *ante* and see note (s) p 539 *note*

(i) Promissory Oaths Act 1868 (31 & 32 Vict c 72) s 6 for forms of the oaths see *ibid* ss 2 and 4 respectively see note (f) p 559 *ante* As to affirmation in lieu of oath see title VIDUA Vol VIII pp 590 *et seq*

(l) Promissory Oaths Act 1871 (34 & 35 Vict c 48) s 2 see p 539 *ante*

(m) Permission to take the oaths thus was granted by ordinance of the Crown in 1882 (4 Municipal Corporations Chronicle 207)

(n) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 157 (2) The terms of the declaration are I A B hereby declare that I will faithfully and impartially execute the office of Justice of the Peace for the borough of — according to the best of my judgment and ability (*ibid* Sched VIII Part I Form B)

(o) 4 Municipal Corporations Chronicle 15th December 1882 207 In boroughs which have no separate commission of the peace the mayor is not authorised to take the oaths before two justices of the county in which the borough is situated but should take them before two members of the borough council (see title LOCAL GOVERNMENT p 302 *ante*) other than aldermen (Letter of Secretary of State 7th November 1892 14 Municipal Corporations Circular 387) When an ex mayor is permanently assigned to the commission of the peace for the borough in the year succeeding his year of office there is doubt whether it is necessary for him to take the oaths again but it is safer for him to do so

(p) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 155 (2) But though he continues to act as a justice for the year succeeding his year of office he does not then retain his right of precedence As to the precedence of the mayor as mayor see title LOCAL GOVERNMENT p 309 *ante*

**SECT 6**  
**Borough**  
**Justices**

when acting in relation to the business of the borough, or of a stipendiary magistrate engaged in administering justice (p,

SUB SECT 1—*The Recorder*

**Precedence**

**1138** In boroughs which have a separate court of quarter sessions (q) the recorder takes precedence next after the mayor in all places within the borough (r) and is the sole judge of the court of quarter sessions (s). The office of recorder is filled by the Crown upon the recommendation of the Home Secretary (t), the qualification being five years' standing at the bar (u).

**Qualification**

**Tenure of office**

**Salary**

A recorder holds office during his good behaviour (a) and receives a salary determined by the Crown but not greater than that stated in the petition asking for the grant of a separate court of quarter sessions (b).

**Capacity to hold other offices**

The recorder may not serve in Parliament for the borough nor be an alderman, councillor, or stipendiary magistrate of the borough but he may act as revising barrister for the borough or sit in Parliament for another constituency (c) and the same person may fill the office of recorder in two or more boroughs conjointly (d).

**Oaths of office**

Before acting either in the capacity of recorder or of justice of the peace he must take the oath of allegiance and the judicial oath and make the required declaration in the same manner as a borough justice (e).

**SUB SECT 6—Jurisdiction of County Justice within the Borough**

**Jurisdiction in boroughs having no separate commission of the peace**

**1139** Where a borough has no separate commission of the peace the justices of the county in which it is situate exercise jurisdiction in it (f). The position as between the borough justices and the county justices that thus ensues is that they have exactly the same powers and authorities within the borough but the ambit of the

(p) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 135 (2) and see further p 545 *post*

(q) For a list of the boroughs having a separate court of quarter sessions see note (f) p 540 *ante*. The Crown on the petition to the Crown in Council of a borough council may grant a borough a separate court of quarter sessions and appoint a recorder (Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 162 (1)).

(r) *Ibid* s 163 (5).

(s) *Ibid* s 165 (2) and see further title COURTS Vol IX p 84. As to the power of the mayor to adjourn the court respite all recognisances until such day as he shall then and there and so from time to time cause to be proclaimed see Municipal Corporations Act 1883 (45 & 46 Vict c 50) s 167 (1) but he may not act as a judge or do any other act in the character of a judge of the court (*ibid* s 167 (2)).

(t) As to whom see title CONSTITUTIONAL LAW Vol VII pp 65-82.

(u) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 163 (1) and see title BARRISTERS Vol II p 382.

(a) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 163 (2).

(b) *Ibid* s 163 (7).

(c) *Ibid* s 163 (8) and see title LOCAL GOVERNMENT p 307 *ante*.

(d) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 163 (8).

(e) *Ibid* s 163 (4), and Sched VIII Part I Form B., and see notes (i) and (m) p 543 *ante*.

(f) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 154 (1).

SECT 6  
Borough  
Justices

exercise of such powers is different that of the county justices includes, while that of the borough justices is limited to offences committed within the borough (g), and, although the mayor is entitled to precedence over all the justices whenever he acts in the borough as a justice of the peace for the borough when the matter to be adjudicated on is borough business, whether it arises under the general law or under some local Act or bye law (h) this is not the case where the matter has once been allocated as county business by the issue of a proper summons to appear before the county justices (i). If the offence was committed in the borough, the borough justices are entitled to sit and act with the county justices, but they cannot intercept the case and deal with it themselves (j).

The mayor and ex mayor of a borough not having a separate commission of the peace can hold special sessions and adjudicate summarily on indictable cases when sitting in a petty sessional court house (l) but they cannot appoint days for holding sessions. Such days must be fixed by the justices for the division of the county in which the borough is situate (l).

Mayor and  
ex mayor  
holding  
special  
sessions

SECT 7—Stipendiary Magistrates

SUB SECT 1—Appointment Qualification and Salary

**1140** In boroughs and in urban districts with a population of 25 000 persons stipendiary magistrates may be appointed and act in place of or in addition to the local justices of the peace (m). Where appointed

(g) *Lawson v Reynolds* [1904] 1 Ch 718 per FARWELL J at p 723 see *R v Amos* (1819) 2 B & Ald 533 and *Reigate Corporation v Hart* (1868) L R 3 Q B 244

(h) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 155 Advice of Law Officers 1889 (see 53 J P 831) See also Home Office Circular 16th October 1907 Stone's Justices Manual 1911 p 65b

(i) *Lawson v Reynolds supra* and see *R v Sainsbury* (1791) 4 Term Rep 451

(j) *Ibid R v Williamson* (1891) 7 T L R 534

(k) As to powers of justices sitting in a petty sessional court house see p 565 *post* but as to licensing sessions see title INTOXICATING LIQUORS Vol XVIII p 21

(l) Opinion of the Law Officers June 1890 see 12 Municipal Corporations Chronicle 231

(m) In the case of boroughs the authority is given by the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (1) and in the case of urban districts (as to which see title LOCAL GOVERNMENT pp 262 *et seq ante*) by the Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 3 the cities or places as defined therein being now known as urban districts under the Public Health Act 1875 (38 & 39 Vict c 55) s 6 and the Local Government Act 1894 (56 & 57 Vict c 73) s 21. The areas to which the Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) applies are by *ibid* s 2 exclusive of places already incorporated or which become so under the Municipal Corporations Act 1882 (45 & 46 Vict c 50) which repealed and re-enacted the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) and of certain areas in which the appointment of a stipendiary magistrate is regulated by special statute. Such special areas and the statutes applicable thereto are the Staffordshire Potteries (Staffordshire Potteries Stipendiary Justice Act 1839 (2 & 3 Vict c 15) amended by the Staffordshire Potteries Stipendiary Justice Act 1871 (34 & 35 Vict c xc) and Staffordshire Potteries Stipendiary Justice Act 1895 (58 & 59 Vict c cxxv) Local Government Board Provisional Orders Confirmation (No 3) Act, 1908 (8 Edw 7, c clxiv) art 5(4) Manchester and

SECT 7

Stipendiary  
Magistrates

How  
appointed

Who may be  
appointed

The appointment is made by the Crown through the Home Secretary on application being made to him by the council of the borough or urban district (*n*). More than one may be appointed for a borough (*o*), but upon a vacancy occurring a new appointment may not be made either in a borough or an urban district except upon application being made by the council as in the first instance (*p*).

The appointment is confined to barristers of seven years standing in the case of boroughs (*q*) and five years standing in the case of urban districts (*r*) and the tenure of office is during His Majesty's pleasure (*s*).

Salary

**1141** The salary attached to the office is fixed by the Crown but may not exceed the sum mentioned in the application except in the case of a borough and then only with the borough council's consent (*t*).

#### SUB SECT 2 —Jurisdiction

Powers of  
stipendiary

**1142** A stipendiary magistrate is *ex officio* a justice of the peace (*a*). He may sit alone and act within his jurisdiction either alone or together with any other justice or justices of the city or place wherein his jurisdiction is situate (*b*). When sitting at a police court or other place appointed in that behalf he has power to do

Salford (stat (1844) 7 & 8 Vict c 30 amended by stat (1851) 17 & 18 Vict c 20) Wolverhampton and district (stat (1846) 9 & 10 Vict c 65) Chatham and Sheerness (Chatham and Sheerness Stipendiary Magistrate Act 1867 (30 & 31 Vict c 63)).

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (1) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 3. But in the case of an urban district the resolution for the application must be carried by a majority of two thirds of the number of the council (*ibid*). In both cases the decision whether any appointment shall be made is in the discretion of the Home Secretary (*ibid*). The boroughs or areas for which stipendiary magistrates are appointed under the above Acts are —

Liverpool, London, Cardiff, Chatham and Sheerness, East Ham, Grimsby, Kingston on Hull, Leeds, Liverpool, Manchester, City of Manchester, Division of Merthyr Tydfil, Middlesbrough, Pontypridd, Salford, Sheffield, South Staffordshire (West Bromwich, Wolverhampton), Staffordshire Potteries (Stoke upon Trent), West Ham, Wolverhampton. The appointment in Manchester and Salford is made through the Chancellor of the Duchy of Lancaster (stat (1854) 17 & 18 Vict c 20 s 4).

(*o*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (7).

(*p*) *Ibid* s 161 (6) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 3.

(*q*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (1) see title BARRISTERS Vol II p 362.

(*r*) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 3. In the case of the Potteries and Wolverhampton the necessary qualification is six years standing in that of Manchester and Salford four years and in that of Chatham and Sheerness five years standing (see the statutes referred to in note (*m*) p 545 *ante*).

(*s*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (2) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 3.

(*t*) *Ibid* s 3. Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 (4). The salary is payable by equal quarterly payments and on the occasion of death of the holder of the office ceasing to act a proportionate sum is to be paid up to such event (*ibid* s 161 (5)).

(*a*) *Ibid* s 161 (3) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 3 and see p 538 *ante*.

(*b*) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 5 and see p 561 *post*. If he sits with other justices the decision is that of the majority present.

done any act and to exercise alone any jurisdiction which may be done or exercised by two justices of the peace (c). All the provisions of any Act of Parliament auxiliary to the jurisdiction of justices of the peace are also applicable to his jurisdiction (c').

SECT 7  
Stipendiary  
Magis-  
trates

• Thus he acts as a court of summary jurisdiction (c) and when sitting in a court house or place appointed sits as a petty sessional court (f) the place where he is sitting being then deemed a petty sessional court house (j).

He may not however act as a justice at any court of general delivery or general or quarter sessions (h).

#### SUB SECT 3—*Deputy and Clerk*

**1143** The stipendiary may with the approval of the Home Secretary appoint a deputy to act for him for a period of time (d) which may not exceed a total of six weeks in any year or in the case of sickness or unavoidable absence three calendar months at one time (k). The deputy who must have practised as a barrister for not less than seven years in order to be eligible has all the powers and may perform all the duties of the stipendiary magistrate whose place he fills during the time of his appointment (l).

Appoint-  
ment  
of deputy

If in the opinion of the Secretary of State a stipendiary magistrate is unable by reason of illness, absence or any other cause to appoint or remove a deputy the former may exercise those powers on the magistrate's behalf and may assign out of the salary payable to him a suitable remuneration for the deputy (m).

**1144** The stipendiary magistrate for an urban district with a population of more than 25 000 persons may appoint his own clerk who must however be a solicitor in actual practice (n). The clerk is removable at the pleasure of the magistrate who may appoint a successor on a vacancy occurring (o).

Appoint-  
ment  
of clerk

(c) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 1 see also Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 33 Indictable Offences Act 1848 (11 & 12 Vict c 42) s 2. Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 5 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (10).

(d) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 1.

(e) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (11) and see Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (10).

(f) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (12) and see Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 2. As to petty sessional courts and court houses see pp 565 *et seq post*.

(g) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (13).

(h) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 3 Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 5. As to acting at licensing sessions see title INTOXICATING LIQUORS Vol XVIII p 35.

(i) Stipendiary Magistrates Act 1869 (32 & 33 Vict c 34) s 2.

(k) *Ibid*.

(l) *Ibid*.

(m) Recorders Stipendiary Magistrates and Clerks of the Peace Act 1906 (6 Edw 7 c 46) s 1 (1) (4). A deputy so appointed has the same powers as if he had been appointed by the magistrate himself (*ibid* s 1 (3)). If the office becomes vacant the deputy may continue to act until it is filled up to a maximum of six months (*ibid* s 1 (2)).

(n) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 6.

(o) *Ibid* and see p 617 *post*.

## SECT 8

Metropolitan  
Police  
Magistrates

Metropolitan  
police  
magistrates  
Appointment  
Qualification  
Tenure  
Number

SECT 8—*Metropolitan Police Magistrates*SUB SECT 1—*Appointment and Qualification*

**1145** Salaried magistrates are appointed to execute the duties of justices of the peace at stated places within the Metropolitan Police District (p)

The appointment is made by the Crown by warrant under the sign manual (q) on the recommendation of the Home Secretary the qualification is practice as a barrister during the seven years previous (r) or having filled the office of stipendiary magistrate in a borough or urban district (s) the tenure of office is during the pleasure of the Crown (t) the number of such magistrates is limited to twenty seven (a)

SUB SECT 2—*Extent of Jurisdiction*

Commission

**1146** The commission under which they act is the same as that of county justices, except that they may not act as justices at general or quarter sessions (b)

Counties  
within  
jurisdiction

The counties to which their jurisdiction may extend are London, Middlesex Surrey Hertford Essex and Kent and all liberties therein (c)

Police court  
divisions

Police court divisions are constituted within the Metropolitan Police District and in each of them a police court is established (d)

(p) The amount of the salary which is payable out of the Consolidated Fund is £1 800 in the case of the chief metropolitan magistrate and £1 500 in the case of all the others. It accrues from day to day during the time of the continuance in office of the magistrate and is payable at such intervals not exceeding three months as the Treasury Commissioners may determine (Metropolitan Police Magistrates Act 1875 (38 & 39 Vict c 5) s 1) As to the Metropolitan Police District see titles METROPOLIS POLICE

(q) Metropolitan Police Act 1829 (10 Geo 4 c 44) s 1

(r) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 3 or practice for the four years then past as a barrister having previously practised as a certificated special pleader for three years below the bar (*ibid*) and see title BARRISTERS Vol II p 382

(s) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 14 see p 545 *ante*

(t) Metropolitan Police Act 1829 (10 Geo 4 c 44) s 1

(a) Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 2 The number appointed at present is twenty five

(b) Metropolitan Police Act 1829 (10 Geo 4 c 44) s 1 and see p 563 *post*

(c) Metropolitan Police Act 1829 (10 Geo 4 c 44) s 1 and see Local Government Act 1888 (51 & 52 Vict c 41) s 40

(d) The Sovereign in Council has power to constitute such divisions and to establish courts (Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 2) The court originally established was that at Bow Street which is still the chief metropolitan police court. Eight others were established before 1840—namely those now called Clerkenwell Great Marlborough Street Lambeth Marylebone Old Street Thames Tower Bridge and Westminster. At each of these a magistrate must attend daily except on Sundays Christmas Day and Good Friday (Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 12) The remaining courts—namely North London West London South Western and Greenwich and Woolwich—were established by Order in Council under the Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) and at these courts attendance

to which particular magistrates are assigned (e), but this does not prevent the magistrates so assigned from acting in all places within the limits of their commission (f).

SECT 8  
Metropolitan  
Police  
Magistrates

### SUBJECT 3 — Appointment of Deputy

**1147** A metropolitan police magistrate is authorised to appoint a deputy with the approval of the Home Secretary to act for him for a time not exceeding in the aggregate six weeks in any year or in the event of sickness or unavoidable absence three months at one time (g).

Deputy

The deputy, who must be a barrister who has practised as such for seven years has all the powers and may perform all the duties of the magistrate whose place he fills (h).

Qualification  
in powers

### SECT 9 — Tenure of Office and Salary of Justices

**1148** A justice who has been assigned to the commission of the peace either for a county or borough and who has taken the oaths enters upon office and except in the event of removal for misconduct, retains office for life or until the commission to which he is assigned is superseded. Stipendiary magistrates and metropolitan police magistrates retain office during the pleasure of the Crown (i).

Tenure of  
office

**1149** A justice who declines or neglects to take the requisite oaths when duly tendered vacates his office if he has already attempted to enter on it and if he has not entered on it he is disqualified from doing so (l). Anything however that he may have done as a justice before being duly qualified is not void as the public interest requires that it should be sustained (l).

Effect of not  
taking oaths

**1150** Upon the issue of a new commission by a Sovereign who has already issued a commission of the peace it is not necessary for justices who were assigned to the old commission to take the oaths again (m) but they are required to sign a roll with the oaths annexed (n). When however a new commission is issued for the

Effect of new  
commission

may be either daily or on such days and times as the Sovereign in Council may direct (Metropolitan Police Courts Act 1940 (3 & 4 Vict c 84) s 4). Orders in Council constituting or altering police court divisions must be published in the *London Gazette* and they take effect from the date named in the order for that purpose (*ibid* s 5) see title POLICE.

(e) Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 2

(f) *Ibid*. As to the varying extent of their jurisdiction within or without the area comprised in the police court districts and the extent to which the ordinary justices of the peace have concurrent jurisdiction see p 562 *post*.

(g) Stipendiary Magistrates Act 1869 (32 & 33 Vict c 31) s 2

(h) *Ibid*.

(i) See pp 546 548 *ante*.

(k) Promissory Oaths Act 1868 (31 & 32 Vict c 72) s 7. Formerly under the Justices Qualification Act 1744 (18 Geo 2 c 20) a justice who acted without taking the required oath as to property qualification was liable to a fine of £100 but that statute was repealed by the Justices of the Peace Act 1906 (6 Edw 7 c 16) s 5 (2) and Schedule.

(l) *Margate Pier Co v Hannam* (1819) 3 B & Ald 266 *R v Herefordshire Justices* (1819) 1 Chit 700.

(m) Justices Oaths Act 1786 (7 Geo 3 c 9).

(n) Justices Qualification Act 1760 (1 Geo 3, c 13) s 2.



**SECT 9**  
**Tenure of**  
**Office and**  
**Salary of**  
**Justices**

**Removal**

**General rule**  
**as to**  
**remuneration**

first time by a Sovereign justices must take the oaths, as they include a reference to the Sovereign by name (*o*)

**1151** A justice of the peace may be removed from the commission of the peace by a writ of discharge or of *superseatas* issued under the Great Seal (*p*) and a person who is a justice *ea officio* may be removed in the same manner (*q*)

**1152** Justices other than stipendiary or police magistrates (*r*), whether of a county or of a borough are unpaid for their services as such (*s*) though some of the offices which entitle the holder to be a justice may lawfully be attached to them (*t*)

## Part II—Disqualification to be or act as a Magistrate

### SECT 1—General Disqualifications

#### SUB SECT 1—*By Profession or Office*

**General rule**

**1153** No one is disqualified at the present day for the office of justice of the peace on the ground of his profession (*a*) but if a

(*o*) Justices Qualification Act 1760 (1 Geo 3 c 13) s 1 Promissory Oaths Act 1868 (31 & 32 Vict c 72) ss 2 & 4 10 compare p 537 *ante*

(*p*) 1 Bl Com 18th ed 303 Should it be desired to petition the Crown to remove a justice the memorial should be addressed to the Lord Chancellor. Where however one who was an elector and an inhabitant of a borough addressed such a memorial to the Home Secretary praying for an inquiry into the conduct of a justice with a view to his removal owing to his alleged misconduct at an election it was held that the memorial was a privileged communication (see title LIBEL AND Slander Vol XVIII pp 687 note (*i*) 690 note (*n*) (2) (1) (b)) the elector having both an interest and a duty in the subject matter thereof and that the memorial being substantially a petition to the Crown the Secretary of State had a corresponding duty to cause the inquiry to be made (*Harrison v Bush* (1855) 5 L & J 344) and see title CONSTITUTIONAL LAW Vol VII p 68

(*q*) Justices of the Peace Act 1906 (6 Edw 7 c 16) s 4

(*r*) For the salary of these see pp 546 note (*p*) 548 *ante*

(*s*) Provision was made by the Statute (1388) 12 Ric 2 c 10 and (1390) 14 Ric 2 c 11 for the payment of wages to justices but this provision has been repealed by the Criminal Justice Act 1825 (18 & 19 Vict c 126) s 21)

(*t*) As to the remuneration of a mayor see title LOCAL GOVERNMENT p 300 *ante* and as to a recorder's salary see p 544 *ante*

(*a*) With regard to the appointment of clergy as justices it was stated by Lord CARRNS L C in the House of Lords that he had found that the rule was that where the Lord Lieutenant recommended a clergyman to be appointed to the bench the holder of the Great Seal requested the Lord Lieutenant to consider whether there was any layman in the county qualified to be placed on the bench and unless the Lord Lieutenant said it was quite impossible to discover a layman so qualified the holder of the Great Seal declined to appoint a clergyman (19 Vol Jo 896) It is a well known rule that ministers of religion are not appointed except in very special circumstances (evidence of Lord LOREBURN L C before the Royal Commission on the Appointment of Justices, 1910 *Times*, 3rd March p 6)

solicitor is assigned to the commission of the peace for any county, neither he nor any partner of his may practise directly or indirectly before the justices for that county or any borough within it (b)

The sheriff of a county may not while he fills that office act as a justice of the peace for that county (c) and if he does so all his acts done in the capacity of justice during his sheriffdom are void (d)

A justice of the peace who is elected coroner for the county or division to the commission of the peace of which he is assigned may continue to act as a justice (e) but the offices of justice and of clerk to the justice in the same county or division are incompatible (f), and if the clerk becomes a justice he thereby vacates his office as clerk (g) If however a justice is appointed clerk of the peace or clerk to the justices he does not apparently vacate the office of justice because he cannot resign that office without the consent of the Crown (h)

# **SECT 1** **General** **Disqualifi-** **cations**

Solicitors  
Sheriffs  
Coroner

(Clerk of the  
Peace or to  
Justices)

## **SUB SECT 2—By Bankruptcy or Crime**

**1154** A bankrupt is disqualified from being appointed or acting as a justice of the peace (i) and if a magistrate is convicted of treason or felony (l) or of any corrupt practice at a parliamentary or municipal election (l) his office is vacated and in the case of the latter conviction whether previously a justice or not he is incapable of holding the office for seven years from the date of conviction (l)

Bankruptcy  
Treason or  
felony  
Corrupt  
practice

## **SUB SECT 3—By Interest or Influence**

**1155** The principle *nemo debet esse iudex in causa propria* and includes a justice who is interested in the subject matter of a dispute from acting as a justice therein (m)

Disqualifi-  
cation by  
interest

(b) Solicitors could not formerly be justices for the county in which they practised (see Justices (Disqualification) Act 1816 (45 Geo 3) s 18) now repealed) but this disability was removed by the Justices of the Peace Act 1906 (6 Edw 7 c 16) s 3. There has never been any statutory prohibition of the appointment of solicitor as borough justice, but where a solicitor or his partner practises before a borough bench there would be a practical objection to his being on that bench. Accordingly it is the custom to require solicitors who are appointed borough justices to give an undertaking similar to the above one in respect relating to county justices and see title SOLICITORS

(c) Sheriffs Act 1887 (50 & 51 Vict c 3) s 17

(d) *Ibid* and see title SHERIFFS AND BAILIFFS

(e) *Davis v Temble & Aire Justices* (1881) 7 Q B D 513 and see title CORONERS Vol VIII pp 219-221

(f) *R v Patteson* (1832) 1 B & Ald 9 *R v Douglas* [1898] 1 Q B 360

(g) *R v Douglas supra* see also *R v Bangor Corporation* (1886) 18 Q B D 349 (A)

(h) So held in Ireland in *Torbes v Lloyd* (1876) 10 I R C L 521 & Ch approving *R v Patteson supra* see also *Worth v Newton* (1894) 10 Exch 247

(i) Bankruptcy Act 1893 (46 & 47 Vict c 52) s 32 (1) (c). This provision extends to an *ex officio* justice see further and as to the removal of such disqualification title BANKRUPTCY AND INSOLVENCY Vol II pp 88-90 269

(l) Forfeiture Act 1870 (33 & 34 Vict c 23) s 2 see title CRIMINAL LAW AND PROCEDURE Vol IX p 428

(m) Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict c 51) s 6 (1). Municipal Elections (Corrupt and Illegal Practices) Act 1884 (47 & 48 Vict c 70) s 2 (2) see further title ELECTIONS Vol XII pp 484-524 525

(n) *L v Farrant* (1887) 20 Q B D 58 see also *Dimes v Grand Junction*

SECT 1  
General  
Disqualifi-  
cations

If however the fact that a justice is interested in the subject matter of a case is known to the parties and objection to his acting is waived the proceedings are not rendered void (*n*) and where the objection is thus waived at the hearing, it cannot afterwards be raised (*o*)

Distinction  
between  
pecuniary  
interest and  
prejudice

**1156** A distinction must be drawn between pecuniary interest and prejudice. The smallest pecuniary interest is subject to any statutory authority to the contrary (*p*) a bar to the justice acting (*q*), but where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that he has a real bias in the matter (*r*)

The interest if pecuniary need not be confined to the justice himself to preclude his acting. Membership of a company (*s*) or association (*a*) which is interested is a bar as also is a bare liability to costs where the decision itself would involve no pecuniary loss (*b*)

*Canal (Proprietors)* (1852) 3 H L Cas 759 *R v Cambridge (Recorder)* (1857) 8 I & B 637

(*n*) *Wakefield Local Board of Health v West Riding and Grimsby Rail Co* (1866) L R 1 Q B 84. In cases arising under the Coal Mines Regulation Act 1887 (50 & 51 Vict c 58) certain classes of persons are disqualified from acting except with the consent of the parties (see p 556 *post*). Otherwise it would appear that where a class of persons is definitely excluded from acting a waiver of the objection would not make the proceedings valid. Where however an Act contains a provision that the justices shall mean the justices of the place where the matter requiring the cognizance of such justices shall arise and who shall not be interested in the matter it has been held that the phrase is merely declaratory of the common law and that the objection may be waived (*Railways Clauses Consolidation Act 1845* (8 & 9 Vict c 20) *Wakefield Local Board of Health v West Riding and Grimsby Rail Co* *supra*)

(*o*) *Ibid* compare *P v Antrim Justices* [1895] 2 I R 603

(*p*) *R v Fand* (1866) L R 1 Q B 230 *R v Farrant* (1887) 20 Q B D 58 *R v Hammond* (1863) 9 L T 423

(*q*) See the text *infra*

(*r*) *R v Sunderland Justices* [1901] 2 K B 57 C A *R v Handsley* (1881) 8 Q B D 383 *R v Rand* (1866) L R 1 Q B 230 *R v Meyer* (1875) 1 Q B D 173. *See v Farrant supra* compare *Eckersley v Mersey Docks and Harbour Board* [1894] 2 Q B 667 C A *per* Lord JESHER MR at p 671 *R (Taxieman) v County Tyrone Justices* [1909] 2 I R 763 also *R v Rochester (Dean and Chapter)* (1851) 17 Q B 1 and as to bias see further p 553 *post*

(*s*) *R v Hammond supra* see *Wakefield Local Board of Health v West Riding and Grimsby Rail Co supra* and see the definition of justices in the Lands Clauses Consolidation Act 1845 (8 & 9 Vict c 18) s 3 title COMPANIES Vol V p 677. But the fact that justices are shareholders in shipping companies whose ships are insured by an association which is a member of another association of which one of the parties is agent is too remote to constitute a disqualifying interest (*R v McKenere* [1892] 2 Q B 519). See further title INTOXICATING LIQUORS Vol VIII p 53

(*a*) *R v Henley*, [1892] 1 Q B 504 and see *R v Allan* (1864) 4 B & S 915 the ground for disqualification in which has now however been removed by statute affecting the particular kind of association (*Salmon Fishery Act 1865* (28 & 29 Vict c 121) s 61) see title FISHERIES Vol XIV p 640

(*b*) *R v Rand, supra per* BLACKBURN, J, at p 233

SECT 1  
General  
Disqualifi-  
cations

Effect of  
pecuniary  
interest as  
ratepayers

**1157** Justices may, however, try offences against an Act which is being enforced by a local authority notwithstanding any prospective loss or benefit to them in their character as ratepayers or members of a class liable to contribute to or derive advantage from the fund to which any fine to be imposed might be payable (c). Similarly they may act as justices on appeals from an assessment to poor rate or highway rate or on matters arising out of the administration of poor relief notwithstanding that they may be pecuniarily interested as ratepayers (d) but they may not so act at quarter sessions (e) except on appeals against an assessment to poor rate in some parish other than their own (f) and in general where no statutory authority to the contrary exists an objection on the ground of interest to a justice acting as such will be sustained even if it is highly technical (g).

**1158** The question of bias may arise if a justice who is a member of a local authority acts as a justice in determining cases arising out of the action of the local authority.

Bias

In some such cases there is express statutory permission to the justice to act as such (h) and then it is not sufficient for a party who alleges bias to show that the justice has as a member of the local authority a pecuniary interest in the result, or that the local authority is in fact prosecutor in the case but it must be established that the particular justice is so interested in the decision that there is real likelihood of bias (i).

Evidence  
required when  
justice  
exercising  
statutory  
power

In the absence of such a provision the fact that a justice is a member of a local authority and a party to the institution of proceedings by it disqualifies him from acting (j) but where his

Effect of  
absence of  
statutory  
authority

(c) Justices of the Peace Act 1867 (30 & 31 Vict c 115) s 2 Public Health Act 1875 (38 & 39 Vict c 55) s 258 Public Health (London) Act 1891 (54 & 55 Vict c 76) s 122 As to proceedings under the Gasworks Clauses Act 1871 (34 & 35 Vict c 41) see title GAS Vol XV pp 354 375 and see further titles FISHERIES Vol XIV pp 639 640 HIGHWAYS STREETS AND BRIDGES Vol XVI p 171

(d) Poor Law (Rating) Act 1742 (16 Geo 2 c 18) s 1 *R v Essex Justices* (1816) 5 M & S 513 *R v Bolingbroke* [1893] 2 Q B 347 *Ex parte Wokington Overseers* [1894] 1 Q B 416 C A But a justice who is himself an appellant against an assessment to poor rate at the same sessions must not sit and determine similar cases to his own (*R v Great Yarmouth Justices* (1882) 8 Q B D 525) As to rating generally see title RATES AND RATING As to poor relief see title POOR LAW

(e) Justices Jurisdiction Act 1742 (16 Geo 2 c 18) s 3

(f) Union Assessment Committee Amendment Act 1864 (27 & 28 Vict c 39) s 6 *R v Bolingbroke* [1893] 2 Q B 347 per WRIGHT J at p 350 compare the cases cited in note (m) p 554 post

(g) *R v Gaisford* [1892] 1 Q B 381

(h) *Eg* the Public Health Act 1875 (38 & 39 Vict c 55) s 258 Public Health (London) Act 1891 (54 & 55 Vict c 76) s 122 Salmon Fishery Act 1865 (28 & 29 Vict c 121) s 61

(i) *R v Handsley* (1882) 8 Q B D 383 (where there was a private Act containing a clause similar to the Public Health Act 1875 (38 & 39 Vict c 55) s 258) The similar case of *R v Gibbon* (1880) 6 Q B D 168 in which there was an opposite decision was in *R v Handsley*, *supra* cited and disapproved Where however the justice is himself a party to the institution of proceedings such a provision would not entitle him to act (*R v Lee* (1892) 6 Q B D 394) See further title INTOXICATING LIQUORS Vol XVIII p 54

(k) *R v London County Council, Ex parte Akkredyk, Ex parte Fernensis*

# **SECT 1** **General** **Disquali-** **cations**

The test  
apart from  
institution of  
proceedings

## **Examples**

action as member of a local authority is confined to adopting an Act of Parliament or issuing a notice authorised by an Act of Parliament and the proceedings (are in fact begun by a party other than the local authority, the justice is entitled to act as such (l)

**1159** Where apart from the institution of proceedings a justice has an interest as a member of a local authority in the result of the proceedings the test is whether in the circumstances of the particular case there is any real likelihood of bias (m). The same rule applies where the justice is a member of a society which is a party to or is interested in the result of the proceedings (n). Mere subscription to the funds of a society which is a party to proceedings (o) or to a fund to enable an application to be heard does not involve disqualification (p) nor does an expression of opinion, if not made in view of the particular proceedings (q).

[1892] 1 Q B 190 see *P v Meyer* (1875) 1 Q B D 173 *Willidge* (1849) 1 O B D 322 *J v Spedding* (1880) 49 J 1 804 *Henley* [1892] 1 Q B 504 (member of a board of conservators) *Crispiths* (1900) 11 Me 18th May (member of a school board)

(l) *H v Huntingdon Justices* (1879) 4 Q B D 222 *R v Fowell* (1884) 43 J 1 741 compare *Ex parte Litchmanin* (1864) 33 J 1 (M C) 99 n (more fully reported 28 J P 87)

(m) *I v Sunderland Justices* [1901] 2 K B 357 C A see *R v Mercer supra*. Where the interest is remote it has in many recent cases been decided that there is no real likelihood of bias see *Fels Corporation v Lyden* [1911] A C 420 *I v Stockport Justices* (1896) 60 J P 552 which was however disapproved in *I v Sunderland Justices supra* *I v Templest* (1902) 66 J 1 47 *R v Middlesbrough Justices Ex parte Hendon Union Assessment Committee* (1908) 72 J P 251. The latter decision was affirmed, appeal against an amendment in one union one of the justices was chairman of the assessment committee of another union did not disqualify him from acting (*R v London Justices Ex parte South Metropolitan Gas Co* (1905) 72 J P 137 (C A)).

(n) *R v Luton Ex parte Young* [1897] 2 Q B 468. In this case proceedings had been taken by the council of the Incorporated Law Society against a solicitor and one of the justices who was a member of that society though not of the council was held not to be disqualified from acting see also *H v Price* (1880) 42 J 1 439 compare *Leeson v General Council of Medical Education and Registration* (1859) 43 Ch D 366 (C A) *Allinson v General Council of Medical Education and Registration* [1894] 1 Q P 750 (C A). But where the justice was a member of a small class of persons in whose interest proceedings were instituted he was held to be disqualified (*R v Uggins* [1890] 1 Q B 563 compare *R v Henley* [1892] 1 Q B 504).

(o) *Goodall v Bilman* [1909] 5 C 1152 see *R v Dual Justice Ex parte Culling* (1851) 45 J 1 429. In Ireland this principle has been extended to the length that a justice may subscribe to a temperance association and even asent to its opposing or returning a solicitor to oppose a licensing application without becoming thereby disqualified from sitting to hear and determine the application (*H (Indalton) v Dublin Justices* [1904] 2 I R 70 but see *R v Iraser* (1893) 57 J P 500 where a justice who attended a temperance meeting at which allusion was made to a licensing application but left the meeting before a resolution was passed to oppose the application was held to be disqualified from acting) see also *R v Ham* (1896) 12 I L R 323 and titles FISHERIES Vol XIV p 640 INTOXICATING LIQUORS Vol XVIII pp 53 54.

(p) *R v Norfolk Justices Ex parte Chamberlain* (1870) 34 J P 773

(q) Thus a justice was held not to be disqualified although in an affidavit in civil proceedings he had expressed an opinion adverse to the claim of a party in a matter in respect of which he sat to hear and determine

A request, addressed by the chairman of a bench of justices to all the justices of the county to attend the hearing, at quarter sessions of an appeal from the decision of his bench with an intimation that the justices of the petty sessional division attached such importance to their decision that they had instructed counsel to appear in support of it, is not such an attempt to influence the decision of the justices of the county as to render them biased at the hearing (1) but justices whose decision is the subject of an appeal must not be present upon the bench at the hearing of the appeal (2)

SECT 1  
General  
Disqualifi-  
cations

A justice is not precluded from acting by being called as a witness at the hearing unless he is interested in the matter (1) nor by his having suggested a settlement out of court in a case where he has been in relation with the parties (2)

Justice as a  
witness

**1160** Allegations of bias should not be lightly made (1) but if any reasonably probable ground for alleging bias exists a justice should not act but should withdraw from the bench during the hearing (2) If he does not do so the result of the proceedings is void upon proof of his presence at the hearing and of there being such reasonably probable ground (3)

Allegations  
of bias

## SECT 2—Special Statutory Disqualifications

**1161** Certain classes of persons are disqualified by statute from acting as justices in specified cases (1) the following examples may be mentioned here —

Classes of  
person  
disqualified

The master or father or son or brother of the master in the

a summons (*P v Alcock Ex parte Chilton* (1885) 37 J T 829) and where a justice signed a petition in favour of the grant of a licence to a grocer and in order to constitute a quorum was unexpectedly called on to sit to hear the application in a petty sessional division in which he did not usually sit his doing so was held not to disqualify him (*P v Taylor Ex parte Voogwill* (1898) 14 T J R 185)

(1) *R v London Justices Ex parte Kerfoot* (1896) 60 J P 726 and see *R (Findlater) v Dublin Justices* [1904] 2 I P 75

(2) *R v Lancashire Justices* (1906) 75 L J (1 B) 198

(3) *R v Toole* (1884) 48 J P 661 see *R (Donnelly) v County Tyrone Justices* (1910) 44 I L L 264

(a) *R v Farrant* (1887) 20 Q B D 58

(b) *Leeds Corporation v Ryder* [1907] A C 420 per Lord ORLBURN LC at p 423 It is not enough to allege that a justice has strong views upon the subject in relation to which he is sitting to hear a case (*Ex parte Wilder* (1902) 66 J P 761) some proof of bias is required (*Ex parte Laverne*) *v County Tyrone Justices* [1909] 2 I R 763 *R v Spurlis* (1909) 73 J P 485

(c) *Ex parte Steeple Morden Overseers* (1855) 19 J P 292 *R v Surrey Justices* (1855) 19 J P 755 *R v Glamorganshire Justices* (1857) 21 J P 773 *R v Suffolk Justices* (1852) 21 L J (M C) 169 compare *R v Corl Justices* [1910] 2 I R 271

(d) *R v Lancashire Justices supra* Where a justice who was chairman of a county council sat during the hearing of a summons against a defendant for breach of a bye law next to the solicitor representing the prosecution and received and replied to a communication from the justices on the bench a *certiorari* to quash the conviction was refused (but without costs) on proof that the communication could not have influenced the decision (*R v Budden* (1896) 60 J P 166) Where bias is alleged and the magistrate does not show cause cause may be ordered against him (*R (O Leary) v Cork Justices* (1911) 45 I L T 3)

(e) See further titles FACTORIES AND SHOPS Vol XIV pp 519 539

**SECT 2**  
**Special**  
**Statutory**  
**Disquali-**  
**cations**

Employers  
and workmen  
or servants

particular manufacture, trade, or business in connection with which an offence is charged under the Trade Union Act, 1871 (f), is precluded from sitting either at the original hearing or on appeal

The owner agent, or manager of a mine, or a miner or miners agent, or the father, son brother father in law, son in law or brother in law of any of these, or the director of a company which owns a mine may not act without the consent of both parties on the hearing of cases arising under the Coal Mines Regulation Act, 1887 (g). A master manufacturer or agent may not act in proceedings under the Masters and Workmen Arbitration Act, 1824 (h) nor may persons engaged in hat making or felt making act in proceedings under the Frauds by Workmen Act 1777 (i) nor persons engaged in the manufacture of hosiery or the father son or brother of persons so engaged in proceedings under the Hosiery Act 1843 (k)

Excise  
officers and  
traders

No officer of excise or person employed in the collection or management of the revenue of excise may act as a justice in proceedings brought under any of the Acts relating to excise and a trader subject to the excise laws is under the same disability in any case which relates to his particular trade or business or to any case in which he is in anywise concerned or interested as a trader. If either excise officer or trader does so act the proceedings are null and void (l)

Members of  
highway  
board

Where the decision of a highway board is appealed against no one who has already acted as a member of the board may act as justice (m)

## Part III—Liability of Magistrates

### SECT 1—*In General*

Limit to  
statutory  
protection

**1162** Protection is accorded by statute to justices in respect of acts done in the execution of their duty as such but this protection does not extend to cases where they have acted either maliciously and without reasonable and probable cause or without or in excess

(offences under the Truck Amendment Act 1887 (50 & 51 Vict c 46) and the Factory and Workshop Act 1901 (1 Edw 7 c 22)) FOOD AND DRUGS Vol XV p 53 (offences under the Bread Act 1836 (6 & 7 Will 4 c 37) INTOXICATING LIQUORS Vol XVIII pp 53 54 (offences under the Licensing Acts)

(f) 34 & 35 Vict c 31 s 22 see title TRADE AND TRADE UNIONS

(g) 50 & 51 Vict c 58 s 69 see title MINES MINERALS AND QUARRIES

(h) 5 Geo 4 c 96 s 12 see title MASTER AND SERVANT

(i) 17 Geo 3 c 56 s 6 see title TRADE AND TRADE UNIONS

(k) 6 & 7 Vict c 40 s 25 see title TRADE AND TRADE UNIONS

(l) Excise Management Act 1827 (7 & 8 Geo 4 c 53) s 68 see title REVENUE

(m) Highway Act 1862 (25 & 26 Vict c 61) s 38 see title HIGHWAYS STREETS AND BRIDGES Vol XVI p 95

### PART III — LIABILITY OF MAGISTRATES

of their jurisdiction, and in such cases they are liable to an action for damages at the suit of the party aggrieved (a)

SECT 1  
In General.

#### SECT 2 — Criminal Information against Justices

**1163** Magistrates who are guilty of gross misconduct in the execution of their office are liable to prosecution on information. Such an information may be filed by the Attorney General (b) for any misdemeanour at his discretion and without leave of the court (c). Where he does so the information is said to be *ex officio* and the institution and conduct of the proceedings are entirely in his hands (d). Notice of the information is commonly given to the defendant by the Master of the Crown Office (e) but it rests with the Attorney General to decide whether he shall give the defendant an opportunity of showing cause why he should not proceed (f). The court no doubt has power to quash an *ex officio* information (g) but the Attorney General may at any stage in the proceedings amend (h) its terms or withdraw it and prefer another (i). An information may be filed by any other person but only by leave of the court given in open court and after the applicant has filed at the Crown Office a recognisance in the penalty of £50 to prosecute the information and to abide by and observe such orders as the court may direct (k).

Criminal  
information  
(i) *ex officio*

(ii) by other  
informers

(a) Justices Protection Act 1848 (11 & 12 Vict c 41) Public Authorities Protection Act 1893 (56 & 57 Vict c 61). For the conditions under which protection is accorded see titles LIMITATION OF ACTIONS p 176 *ante* PUBLIC AUTHORITIES AND PUBLIC OFFICERS and see further titles MALICIOUS PROSECUTION AND PROCEDURE p 672 *post* and for false imprisonment see title TRESPASS.

(b) If the office of the Attorney General is vacant the Solicitor General has the right in his place (*A v Willes* (1770) 4 Burr 2527). The Attorney General of the Duchy of Lancaster has no such right and the information exhibited by him will be removed from the file on the application of the defendant even after he has put in an answer to it (*A G of Duchy of Lancaster v Devonshire (Duke)* (1884) 14 Q B D 195).

(c) *R v Phillips* (1767) 4 Burr 2089 where Lord Mansfield C J held that it was not for the court to grant the information on the application of the Attorney General but for the latter himself to file it see also *R v Leicester Corporation* (1767) 4 Burr 2087 and generally title CRIMINAL LAW AND PROCEDURE Vol IX p 329 note (v).

(d) The venue may not be changed without his consent (*A G v Smith* (1816) 2 Price 113).

(e) Stephen's Digest of Criminal Procedure 126 n.

(f) *R v Phillips supra*.

(g) *Fountain's Case* (1663) 1 Sid 152.

(h) *A G v Ray* (1843) 11 M & W 464. *A G v Smith* (1839) 5 M & W 372.

(i) Compare *R v Willes supra* *R v Holland* (1791) 4 Term Rep 457.

(k) Crown Office Rules 1906 (Statutory Rules and Orders 1906 605 *et seq*) r 35. The provision that informations should only be filed by leave of the court dates from an Act passed to prevent malicious informations in the Court of King's Bench (stat (1692) 4 Will & Mar c 18 see also title CRIMINAL LAW AND PROCEDURE Vol IX pp 329 330 note (v)). The recognisance must be entered into before the King's Coroner and Attorney or the Master of the Crown Office or a justice of the peace of the county.



SECT 2  
Criminal  
Information  
against  
Justices

Nature of  
complaint

Procedure

Grounds  
upon which  
application  
granted

**1164** The grievance or act of misconduct complained of must relate to the behaviour of the magistrate as such (*l*) and a notice containing a distinct statement thereof must be served upon him personally or left at his residence with some member of his household six days before the time named in it for making the application (*m*). The application must be made to a Divisional Court (*n*), by motion for an order *nisi* within a reasonable time after the offence complained of (*o*), and the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives and further where an unjust conviction is alleged that the person convicted was innocent of the charge (*p*).

**1165** The grounds upon which an application by a private person will be granted are in the discretion of the court (*q*) the tendency in recent times having been to confine the granting of such applications to cases of public importance (*a*).

The application has at different times been granted against magistrates for extortion (*b*) for acting where they were directly interested (*c*) for the improper conviction of innocent persons (*d*) for an illegal sentence (*e*) for interfering with the order of another magistrate (*f*) for refusing bail improperly (*g*), for corruptly making a false return to a mandamus (*h*) and for neglect of duty

borough or place in which the cause arises (Crown Office Rules 1906 r 35)

(*l*) Crown Office Rules 1906 r 36 compare *Ex parte Lee* (1843) 7 Jur 441 *R v Arrowsmith* (1843) 2 Dowl (N s) 701

(*m*) Crown Office Rules 1906 r 36 and see *R v Heming* (1833) 5 B & Ad 666 *R (Hanafin) v Pae* (1874) 8 I R C L 524

(*n*) See title COURTS Vol IV p 59

(*o*) Crown Office Rules 1906 r 37 Twelve months was held to be too long even though the applicant stated that the facts had only come to his knowledge shortly before the application (*P v Bishop* (1822) 5 B & Ald 612) and see *P v Smith* (1796) 7 Term Rep 80 *R v Saunders* (1841) 10 Q B 484 *R v Hannes* (1811) 13 East 270 *R v Marshall and Grantham* (1811) 13 List 322

(*p*) Crown Office Rules 1906 r 37 compare *R v Webster* (1789) 3 Term Rep 388 *R v Williams* (1822) 5 B & Ald 595 *R v Athay* (1758) 2 Burr 653 *R v Bailor* (1800) 1 List 186

(*q*) *R v Jolliffe* (1791) 4 Term Rep 285 290

(*a*) *R v Labouchere* (1884) 12 Q B D 320 at p 327 where Lord COLERIDGE C J in the course of his judgment reviewed the ground and the varying degrees of frequency with which the application had been granted in the past and cited with approval the case of *H v Winchelsea* (Lord) (1865) not otherwise reported and passages from the judgments therein of COCKBURN C J and BLACKBURN J to this effect compare *R v Seaford Justices* (1763) 1 Wm Bl 432 *R v Steward* (1831) 2 B & Ad 12

(*b*) *R v Jones* (1743) 1 Wils 7

(*c*) *R v Davis* (1772) 1 Offt 62 (where although the information was not granted the justice was not allowed costs) see *R v Whately* (1829) 4 Man & Ry (κ B) 431 and *R v Hoseason* (1811) 14 East 805

(*d*) *R v Webster supra* *R v Saunders supra*

(*e*) *R v Mather* (1733) 2 Barn (κ B) 249

(*f*) *R v Brooks* (1788) 2 Term Rep 190

(*g*) *R v Badger* (1843) 4 Q B 488

(*h*) *R v Lancashire Justices* (1822) 1 Dow & Ry (κ B) 485 *R v*

in not using force to suppress a riot (*i*) It has also been granted for corruptly making illegal appointments (*l*) and for the grant or refusal of licences from corrupt motives (*l*) or political prejudice (*m*) or resentment (*n*)

SPOT 2  
Criminal  
Information  
against  
Justices

**1166** The principle acted upon is to inquire into the motive from which the act complained of has proceeded and not to grant the application unless there is disclosed a dishonest corrupt or oppressive motive under which description fear and favour may generally be included (*o*)

Principle  
acted on by  
the court

An error or mistake *bona fide* committed by a magistrate or a mere irregularity (*p*) does not justify an application for an information (*q*)

Matters not  
justifying  
complaint

Where the act complained of is done at general or quarter sessions very strong evidence of corrupt motive or deliberate misconduct is required (*r*)

## Part IV —Local Limit of Justices' Jurisdiction

### Sect. 1 — *11 Petty Sessions*

#### SUB SECT. 1 — *County Justices*

**1167** The local limit of a justice's jurisdiction is in general determined by the extent of the county or borough to the commission of the peace of which he is a justice (*s*) but its limit have been enlarged or restricted by statute in the case of particular duties

Local limit

The commission of a county justice extends to the whole

*Spotland Overseers* (1733) *Lco temp Hard* 154 *I v 1 Howard* (1800) 4 Burr 2452

(*a*) *R v Heming* (1853) 5 B & Ad 666 *R v Pimney* (1852) 3 Scute Tr (N S) 17

(*l*) *R v Somersetshire Justices* (1852) 1 Dow & Ry (K B) 443

(*b*) *L v Holland and Forsler* (185) 1 *Leam temp* 694

(*m*) *R v Williams* *R v Davis* (1762) 3 Burr 1517

(*n*) *P v Hann and Price* (1765) 3 Burr 1716 compare *R v Young and Putts* (1758) 1 Burr 556

(*o*) *R v Horron* (1820) 3 B & Ald 432 *per ABBOTT C J* at p 434 *I v Badger* (1843) 4 Q B 468 *Pe Venturian* (1834) 4 Nev & M (K B) 126 *P v Baylis* (1762) 3 Burr 1318 *R v Cozens* (1780) 2 Doug (K B) 426 *Re* — (1852) 16 Jur 995 *L v Williamson* (1820) 3 B & Ald 592

(*p*) *R v Borron* *supra* *P v Jackson* (1787) 1 *Leam Pap* 653 *L v Barton* (1850) 4 Cox C C 353

(*q*) *R v Fielding* (1759) 2 Burr 719

(*r*) *L v Seaford Justices* (1763) 1 Wm Bl 432 *P v Phelps* (1757) 2 Keny 570 compare *R v Shrewsbury Justices* (1733) 2 Barn (K B) 272 *R v Lyres* (1733) 2 Barn (K B) 250

(*s*) See p 536 *ante* Where a magistrate is assigned to two separate commissions of the peace for two places adjoining one another he is authorised to act for either of them while he is residing in the other (Indictable Offences Act 1848 (11 & 12 Vict c 42) s 6)

**SECT 1**  
**At Petty Sessions**

**County magistracy**

county (t), including the detached part of any other county which may be either wholly or in part surrounded by it (u) It also embraces all the boroughs within the county (v), except such as are counties of themselves (A) or such as have a court of quarter sessions of their own and are exempted from the county jurisdiction (a) But in all boroughs within the county and in any borough adjoining the county to the commission of the peace of which he is assigned a county justice is empowered to act in matters that are the business of the county (b)

**Offences not within the county**

**1168** An offence committed within five hundred yards of the boundary of any county may be dealt with by the magistrates of that county as if it were a matter arising within the county (c)

**Accessories**

An accessory before the fact to an offence punishable summarily may be tried either in the area where the principal offender is tried or in that in which he aided or procured the commission of the offence (d)

**Jurisdiction in petty sessions**

**1169** A county justice may sit in petty sessions in any petty sessional division in the county (c) and at such sessions may adjudicate upon any matter not specially excepted by statute (f) which arises in any part of the county (g) except in boroughs that

(t) Or to the riding or part of any county which has a separate commission of the peace see Justices of the Peace Act 1906 (61 edw 7 c 16) s 5 (1) and p 536 *ante*

(u) Counties (Detached Parts) Act 1839 (2 & 3 Vict c 82) s 1 Indictable Offences Act 1848 (11 & 12 Vict c 42) s 7 see also Counties (Detached Parts) Act 1844 (7 & 8 Vict c 61)

(v) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 154 (1)

(u) For a list of these see note (f) p 540 *ante*

(a) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 154 (u) The exemption where it exists is effected by the insertion of a *non intromittant* clause in the charter of boroughs that became such before the operation of the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) now repealed and replaced by the Municipal Corporations Act 1882 (45 & 46 Vict c 50) or in the grant of a separate court of quarter sessions where the borough has been constituted since 1835 see note (f) p 541 *ante*

(b) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 6 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 6

(c) Criminal Law Act 1826 (7 Geo 4 c 64) s 12

(d) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 5 and see title CRIMINAL LAW AND PROCEDURE Vol IX p 258

(e) Including detached parts of other counties whether such detached parts remain separate petty sessional divisions or are reconstituted by the justices in quarter sessions (Counties (Detached Parts) Act 1844 (7 & 8 Vict c 61) s 3) It is however customary for justices to act regularly in one petty sessional division and appointments to the Bench are usually made with a view to the requirements of each division As to petty sessional divisions see p 565 *post*

(f) As to applications in bastardy cases see title BASTARDY Vol II p 444 and compare *E v Brodhurst* (1863) 32 L J (M C) 168 a case arising under the Public Health Act 1848 (11 & 12 Vict c 63) (now repealed) The licensing duties of magistrates are carried out with reference to the licensing districts where the various matters arise see title INTOXICATING LIQUORS Vol XVIII pp 21 *et seq* 35 *et seq* As to special sessions generally see p 568, *post*

(g) *P v Beckley* (1887) 20 Q B D 187, C C R *Bueller v Wilson*

are counties of themselves or boroughs having a court of quarter sessions of their own and exempted from county jurisdiction

SECT 1  
At Petty  
Sessions

SUB SECT 2 —*Borough Justices*

**1170** In boroughs which have a separate commission of the peace, whether they are counties of themselves and whether they have a court of quarter sessions or not the jurisdiction of their justices in petty sessions is co extensive with the area of the borough (*h*)

Jurisdiction  
in boroughs  
with separate  
commission

In boroughs which have no separate commission of the peace the local jurisdiction of the mayor and ex mayor in petty sessions is co extensive with the area of the borough (*i*)

In other  
boroughs

SUB SECT 3 —*Stipendiary Magistrates*

**1171** In boroughs and urban districts for which a stipendiary magistrate is appointed his local jurisdiction in petty sessions is co extensive with the area of the borough or urban district (*l*) except where the appointment is made in execution of a special Act of Parliament in which case his jurisdiction extends to the limits defined in such Act (*l*)

Jurisdiction  
of stipendiary  
magistrates

SUB SECT 4 —*London Justices*

**1172** In London the local jurisdiction in petty sessions of the Lord Mayor and Aldermen of the City of London is co extensive with the area of the City (*m*) while that of the justices of the

Lord Mayor  
and Alder-  
men

[1896] 1 Q B 83 The county includes detached portions of other counties wholly or partly surrounded by it (see note (*u*) p 560 *ante*) and places within 500 yards of its borders (see p 560 *ante*). Where a county is situated partly within the Metropolitan Police District (see p 548 *ante*) offences committed within the district against the Metropolitan Police Acts may be dealt with by the county justices if their court house is within the district but if it is not the county justices have no jurisdiction and the matter must be dealt with at a police court in one of the police court districts (*Dann v Vanby* (1872) 26 L T 730). The justices of such a county cannot compel the appearance before them at any place outside the Metropolitan Police District of a person who resides within the district in answer to an information or complaint touching a matter which arises within the district except for the purpose of enforcing payment of rates and taxes levied for some place only part of which is within the district (Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 18).

(*h*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 158 see p 540 *ante*

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 155 see p 538 *ante*

(*k*) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 5 Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 161 see p 546 *ante*

(*l*) See p 546 *ante*. Thus the jurisdiction of the stipendiary magistrate for Chatham and Sheerness extends over the whole of the waters of the estuary of the Thames below Gravesend whether in the county of Kent or not and his warrant may be served without indorsement in any part of the county of Kent (Chatham and Sheerness Stipendiary Magistrate Act 1867 (30 & 31 Vict c 63) ss 6 7 and see note (*m*) p 545 *ante*). As to his jurisdiction in licensing matters see title INTOXICATING LIQUORS, Vol XVIII p 35.

(*m*) Compare Local Government Act 1888 (51 & 52 Vict c 41), s 41 (1) and see title METROPOLIS

## SECT 1

**At Petty Sessions**County  
justices

county of London is co extensive with the area of the county excluding the City (*n*) but the jurisdiction of the county justices except in the case of acts directed to be done at petty sessions of all the justices is complementary and parallel to the jurisdiction of the metropolitan police magistrates

Jurisdiction  
in metro  
politan police  
court  
districts

**1173** In such parts of the county of London as have been constituted police court districts the county justices are not entitled to charge fees for anything done by them as such in the exercise of their criminal jurisdiction (*o*) but it does not seem that their jurisdiction is ousted by that of the police magistrates (*p*) although no mandamus will be issued to compel the justices to exercise it (*q*)

Limits to  
exercise of  
county  
justices  
powers

Within such districts the powers conferred by the Metropolitan Police Acts (*r*) cannot be exercised by the county justices unless at least two of them are sitting at a police court (*s*) and in the case of police courts at which the regular attendance of a police magistrate is ordered under the Metropolitan Police Courts Act 1840 (*t*) unless there is no police magistrate present. In practice, therefore the petty sessional jurisdiction of the county justices in police court districts is restricted to licensing and other special sessions matters poor law and other parochial or union matters, and the enforcing of the payment of rates and taxes (*a*)

Jurisdiction  
outside metro  
politan police  
court districts

In the remainder of the county of London outside the limits of the police court districts the county justices have unrestricted petty sessional jurisdiction in the same manner as other county justices (*b*) although in criminal matters and matters arising under the Summary Jurisdiction Act a police magistrate sitting at any of the police courts of the police court districts has concurrent jurisdiction (*c*)

(*n*) A commission of the peace for the county of London was provided for by the Local Government Act 1858 (1 & 52 Vict c 41) s 115 (1)

(*o*) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 42

(*p*) *Dodson v Williams* (1892) *Lunes* 10th and 12th August S C (1894) *Times* 23rd January

(*q*) *R v Young* (1891) 61 L J (M C) 42 C A

(*r*) Metropolitan Police Act 1839 (2 & 3 Vict c 47) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71)

(*s*) Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 6

(*t*) *Ibid* The police courts referred to are North London West London South Western Greenwich and Woolwich

(*a*) Metropolitan Police Court Act 1840 (3 & 4 Vict c 84) s 6. In regard to all these subjects with the exception of licensing and other special sessions matters the police magistrates have concurrent jurisdiction. As to licensing matters see title INTOXICATING LIQUORS Vol XVIII pp 22 35

(*b*) They may at their own petty sessional courts deal with cases under the Metropolitan Police Acts (Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 6) and while doing so they enjoy the same protection as police magistrates (*Barnett v Cox* (1846) 16 L J (M C) 27). Penalties inflicted by them under these Acts at such courts do not go to the Receiver (*Folke (Receiver) v Bell* (1872) 1 R 7 Q B 433) and see title POLICE. They do not however enjoy the powers in regard to deserted premises given to a police magistrate (*Eduards v Hodges* (1855) 15 C B 477) and see title LANDLORD AND TENANT Vol XVIII p 561 note (*m*)

(*c*) *R v Richards* (1801) 16 L T (O S) 386 see also *R v St George Bloomsbury* (1801), 20 L J (M C) 200

SUB SECT. 1—*Metropolitan Police Magistrates*

## SECT. 1

## At Petty Sessions

**1174** The jurisdiction of the metropolis in police magistrates (*d*) as a court of petty sessions is restricted to such times as they are so sitting in one of the police courts in a police court district (*e*)

Jurisdiction as court of petty sessions

When so sitting a metropolitan police magistrate has all the powers of a court of summary jurisdiction to deal with any matter arising in the Metropolitan Police District (*f*)

Position outside metropolitan police court districts

Outside the area of the police court districts he is entitled to act in the same manner as any other justice for any of the counties for which he is commissioned (*g*) but he may not either within or without the area of the police court districts act at any special sessions of justices (*h*)

SECT. 2—*1st Quarter Sessions*

**1175** In quarter sessions (*i*) the jurisdiction of county magistrates extends to all parts of the county to the commission of the peace of which they are assigned and to all boroughs within it that are not counties of themselves and have no quarter sessions of their own (*l*)

County magistrates

The magistrates in boroughs which are counties of themselves have a jurisdiction similar to that of other county magistrates in quarter sessions (*l*) The magistrates in boroughs which have a separate commission of the peace and the mayor and ex mayor in other boroughs have no jurisdiction at quarter sessions (*m*) neither have metropolitan police (*n*) nor other stipendiary magistrates (*o*) The Lord Mayor Aldermen and Recorder of the City of London however have quarter sessions jurisdiction in a court of the Lord Mayor and Aldermen of London (*p*)

Borough magistrates

(*d*) As to whom see also p 518 *ante*

(*e*) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 14 compare Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 13 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (10) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (12) (13)

(*f*) See notes (*p*) (*c*) p 518 *ante*

(*g*) Metropolitan Police Courts Act 1840 (3 & 4 Vict c 34) s 2

(*h*) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 14 As to his jurisdiction in licensing matters see title INTOXICATING LIQUORS Vol XVIII pp 35 48 The police magistrates are the authority within the London Police Courts Districts (except in Southwark) to whom application must be made for the transfer of licences pending the next special licensing session of the justices (Licensing (Consolidation) Act 1910 (10 Edw 7 & 1 Geo 5 c 24) s 88 (8) )

(*i*) As to procedure in courts of quarter sessions see p 639 *post*

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 154 As to their jurisdiction in licensing appeals see *R v Deane* (1841) 10 L J (M C) 126 *R v Cockburn* (1854) 4 E & B 265 title INTOXICATING LIQUORS Vol XVIII pp 78 79

(*l*) See *P v St Maurice (Inhabitants)* (1851) 16 Q B 908 *R v Pearce* (1880) 5 Q B D 386

(*m*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 158 (1) and see pp 538 544 *ante*

(*n*) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 14

(*o*) Stipendiary Magistrates Acts 1858 (21 & 22 Vict c 73) s 3 and 1863 (26 & 27 Vict c 97) s 5

(*p*) City of London Charter 1742 compare Local Government Act, 1888 (51 & 52 Vict c 41) s 100

SECT 3  
Extended  
Jurisdiction  
in respect of  
Warrants of  
Arrest

Backing  
warrants

Warrant of  
metropolitan  
police  
magistrates

Indorsement  
in Ireland  
Scotland etc

SECT 8 — *Extended Jurisdiction in respect of Warrants of Arrest*

**1176** A warrant of arrest (*q*) granted by a justice for any area having a separate commission of the peace, may be indorsed by any justice of any other such area in England or Wales, upon proof being given on oath of the handwriting of the justice who issued the warrant (*r*) and such indorsement is sufficient authority to the person bringing the warrant for indorsement and also to the constables and peace officers of the area where the indorsement is made to execute the warrant at any place within that area and bring the person against whom it was issued before the justice who issued it or some other justice for the area in which it was issued or in which the offence is stated in the warrant to have been committed (*s*)

**1177** A warrant by a metropolitan police magistrate does not require indorsement by any local justice to enable it to be served and executed outside the Metropolitan Police District by the police to whom it is directed (*t*)

**1178** Warrants of arrest granted by a justice having jurisdiction in any county or borough in England may be indorsed by a magistrate in Ireland (*a*) or a sheriff or sheriff depute or substitute, or justice of the peace in Scotland (*b*) or any officer who himself is empowered to issue a warrant of arrest in the Isle of Man or Channel Islands (*c*) and *vice versa* (*d*) Such an indorsement is sufficient authority to the person bringing the warrant for indorsement and to the constables and peace officers of the area where the indorsement is made to execute the warrant at any place within that area and bring the person before the justice who issued it or some other justice for the area in which it was issued (*e*)

**1179** A justice before whom a person is brought under any

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(*q*) As to the jurisdiction to issue warrants see title CRIMINAL LAW AND PROCEDURE Vol IX pp 291 292 Indictable Offences Act 1848 (11 & 12 Vict c 42) s 1 Alternatively the magistrate may in the first instance issue a summons and subsequently in the event of disobedience to the summons a warrant (*ibid* see pp 593 *et seq post*) But he must issue a warrant if there is produced to him a certificate showing that an indictment has been found by a grand jury against the alleged offender (Indictable Offences Act 1848, 11 & 12 Vict c 42) s 3)

(*r*) *Ibid* s 11

(*s*) *Ibid* The magistrate in indorsing the warrant may direct the alleged offender to be brought before him and he may examine such witnesses and receive such evidence in proof of the charge as shall be produced before him within his jurisdiction (*ibid* s 22)

(*t*) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 17 This power is also conferred upon any two justices having authority within the Metropolitan Police District (Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 6), and upon any two justices of the peace for the City of London (*ibid* s 15)

(*a*) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 12

(*b*) *Ibid*, s 14

(*c*) *Ibid* s 13

(*d*) *Ibid* ss 12—15

(*e*) *Ibid*, ss 12—14

warrant so indorsed may thereupon proceed in the same manner as if the person had been arrested within his jurisdiction (j)

**1180** A warrant of arrest granted by a justice in England or Wales, may be indorsed and executed in any other part of His Majesty's dominions (q)

In the case of crimes committed in any place within the jurisdiction of the Admiralty (h), or of crimes committed in places beyond the seas for which an indictment may be preferred at any place in England and Wales (i), any justice may issue a warrant for the arrest of the alleged offender if he is or is suspected of being within his jurisdiction and cause him to be brought before him or some other magistrate for the same area (j)

**SECT 3**  
**Extended**  
**Jurisdiction**  
**in respect of**  
**Warrants of**  
**Arrest**

Execution of  
warrant in  
colonies etc  
Warrant in  
respect of  
offences  
beyond the  
seas etc

## Part V—Petty Sessions and Single Justices

### SECT 1—*The Court of Petty Sessions*

**1181** The court of petty sessions is a court of summary jurisdiction consisting of two or more justices sitting in a petty sessional court house (k)

Petty sessions

The term petty sessional court house means a court or other place at which justices are accustomed to assemble for holding special or petty sessions or which is for the time being appointed as a substitute therefor (l) including any court house or place at which the Lord Mayor or an Alderman of the City of London or a metropolitan police magistrate or stipendiary is authorised to act alone as a court of petty sessions (m)

Petty  
sessional  
court house

**1182** The sub division of counties into petty sessional divisions is historically the consequence of the size of the areas for which county justices of the peace are commissioned

Petty  
sessional  
divisions

(f) Indictable Offences Act 1848 (11 & 12 Vict c 42) ss 12—14

(g) Fugitive Offenders Act 1881 (44 & 45 Vict c 69) s 3 As to the converse case and generally as to extradition warrants and the arrest of fugitive offenders see title EXTRADITION Vol XIV pp 408 409 421—430

(h) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 2 As to the limits of Admiralty jurisdiction see title CRIMINAL LAW AND PROCEDURE Vol IX pp 273 *et seq*

(i) As to these see title CRIMINAL LAW AND PROCEDURE Vol IX pp 276 *et seq*

(j) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 2

(k) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (12) As to the persons included in the term see the text *infra* and title COURTS Vol IX p 75 As to the powers of justices to sit and act alone see Summary Jurisdiction Act 1848 (11 & 12 Vict c 43), ss 33 34 and p 573 *post*

(l) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (13) The definitions in this Act replace those in the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) ss 20 50 For the meaning of occasional court house see p 568 *post*

(m) Interpretation Act, 1889 (52 & 53 Vict c 63) s 13 (13)



SECT 1  
The Court  
of Petty  
Sessions  
—  
Statutory  
limitations

In some cases it was ordered by statute that matters should be transacted or determined within the division or limits where they arose or wherein the parties concerned resided or exercised their trade or calling in others not required to be heard before all the justices on the commission it became the custom to have the matter determined by such justices as lived or usually acted in the part of the county where it arose (*n*). This system was subsequently regularised by statute (*a*) by which the mode of creating new divisions and readjusting the boundaries of old ones was prescribed

Method of  
determining  
boundaries of  
divisions

**1183** The authority which determines the boundaries of the divisions in any county is the court of quarter sessions

Any two or more justices may submit a statement proposing the constitution of a new division and this statement which must contain particulars of the extent to which the proposed alteration would affect existing divisions is to be laid before the justices at the next quarter sessions by the clerk of the peace (*b*). After consideration of the statement (*c*) the court may either simply adopt or reject the proposal (*d*) or revise all the divisions in the county and readjust their boundaries specifying each division by the name of some principal and convenient place (*e*) but no new division may be constituted unless there are five justices residing in or usually acting within its proposed boundaries (*f*). The order made by quarter sessions must be published by the clerk of the peace (*g*) and, unless petitioned against or if petitioned against then after the petition is heard must be enrolled (*h*) if either which the divisions

(*n*) Compare the preamble to the Division of Counties Act 1828 (9 Geo 4 c 43)

(*a*) *Ibid* The uncertainty of existing divisions rendered regulation imperative. It appeared in *I v Dixon Justices* (1818) 1 B & Ald 88 that for a period of five years two justices had without the consent of their colleagues been acting as a court of petty sessions for the district in which they lived

(*b*) Division of Counties Act 1828 (9 Geo 4 c 43) ss 1 2 The clerk of the peace must advertise the statement in the local newspaper after it is laid before quarter sessions (*ibid* s 3)

(*c*) The consideration must take place at the sessions next after that at which the statement is laid before the justices (*ibid* s 2)

(*d*) *Ibid* or they may adjourn the consideration to any succeeding sessions (*ibid*)

(*e*) *Ibid* s 4 The naming of the division is important. Where the petty sessions were held at several places in a division and an affiliation order was made at one of these and stated to be at such place for the division of that name when in fact the division was called by another name it was held that there was no jurisdiction to make the order it not having been made at the petty sessions held in and for the division where the mother resided (*R v Hittles* (1849) 13 Q B 245 254)

(*f*) Division of Counties Act 1828 (9 Geo 4 c 43) s 5

(*g*) *Ibid* s 4 In the case of the formation of a new division simply see *ibid* s 4 in the case of a general division see *ibid* s 8

(*h*) The enrolment must not take place until the fourth quarter sessions after the making of the order (*ibid* s 9). When it has taken place the fact is to be advertised in the local newspapers by the clerk of the peace (*ibid* s 11). Any person may petition against the order but is required to give certain notices of his petition three days before the quarter sessions are held at which he desires it to be considered (*ibid* s 9). There is no appeal by means of *certiorari* or otherwise against any order or proceeding

specified are lawful divisions for the holding of special or petty sessions, and their constitution cannot be altered for a period of three years (*i*)

# SECT 1 The Court of Petty Sessions

Provision of  
petty  
sessions  
court houses  
by county  
councils.

**1184** The county councils in succession to the justices in quarter sessions are empowered to provide a petty sessional court house (*l*) or more than one, for any division (*l*) and to borrow money for the purpose (*m*). The court house may be situated outside the limits of the division, and even of the county for which it is provided but for the purpose of the justices jurisdiction it is to be deemed to be within such county and division (*n*). The justices of two contiguous counties are empowered to combine in providing at the joint expense of the two counties a court house near the common boundary for the use of justices of their respective adjoining divisions (*o*).

Similar powers to those given to the county council for the provision of petty sessional court houses in counties are given to the councils in boroughs (*p*).

by borough  
councils

In either counties or boroughs the county court may be obtained for use as a petty sessional court house by agreement with the justices of the county court (*q*).

Use of county  
court

No meeting of justices in petty or special sessions may be held in premises licensed for the sale of intoxicating liquors nor in any room whether licensed or not in any building so licensed (*r*).

Prohibition  
against use of  
licensed  
premises

## SECT 2—Courts of Summary Jurisdiction

**1185** A court of summary jurisdiction includes a court of petty sessions and also a single justice when either are acting in exercise of their powers of summary jurisdiction under the Summary Jurisdiction Acts or any of them, or under any other Act or by virtue of the commission or under the common law (*s*). Such powers

Court of  
summary  
jurisdiction

of the court of quarter sessions in regard to this matter (*ibid* s 12 see also the Petty Sessional Divisions Act 1836 (6 & 7 Will 4 c 12) (*t*)).

(*i*) Division of Counties Act 1828 (9 Geo 4 c 43) s 10 Petty Sessional Divisions Act 1836 (6 & 7 Will 4 c 12) s 1

(*l*) Petty Sessions Act 1849 (12 & 13 Vict c 18) s 2 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 30 Local Government Act 1885 (51 & 52 Vict c 41) s 3 and see title LOCAL GOVERNMENT pp 364 369 *ante*

(*l*) Summary Jurisdiction Act 1884 (47 & 48 Vict c 45) s 8

(*m*) Public Works Loan Act 1875 (38 & 39 Vict c 89) s 40

(*n*) Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 8

(*o*) Petty Sessions Act 1849 (12 & 13 Vict c 18) s 3

(*p*) *Ibid* s 2 Petty Sessions and Lock up House Act 1868 (31 & 32 Vict c 22) ss 4 5 Public Works Loans Act 1875 (38 & 39 Vict c 89) s 40 Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 105 160 and see title LOCAL GOVERNMENT p 318 *ante*. The provision of a court house by two or more councils at their joint expense however requires the approval of a Secretary of State (Petty Sessions and Lock up House Act 1868 (31 & 32 Vict c 22) s 4).

(*q*) Petty Sessions Act 1849 (12 & 13 Vict c 18) s 2

(*r*) Licensing (Consolidation) Act 1910 (10 Edw 7 & 1 Geo 5 c 24) s 83 as to the meetings of borough justices see also the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 160

(*s*) The existing statutory definition of the term court of summary

**SECT 2.**  
**Courts of**  
**Summary**  
**Jurisdiction.**

Occasional  
court house

must be exercised by the justices or justice when sitting in open court (a), which means a petty sessional court house or an occasional court house (b)

An occasional court-house is a police station or other place appointed by the justices of a petty sessional division to be used as such (c) The number of such places to be appointed is not limited by statute (d)

**SECT 3—Times for Holding Courts**

Petty  
sessions

**1186** A petty sessional court may be held at any time and without notice to all the justices who usually reside in and act for the petty sessional division but it is the practice for the justices in each division to specify one or more days in the week and to assemble regularly upon those days in petty sessions They may only try indictable offences that may be dealt with summarily on days appointed for the hearing of indictable cases and of which public notice has been given (e)

Court of  
summary  
jurisdiction

A court of summary jurisdiction (f) may be held at any time without notice and it is the practice for one or more justices to sit as such a court whenever circumstances require

**SECT 4—Special Sessions**

Definition

**1187** Special sessions are meetings of the justices convened for the purpose of executing some statutory authority which is exercisable by justices out of quarter sessions (g)

jurisdiction is that given in the Interpretation Act 1889 (50 & 53 Vict c 63) s 13 (11) repealing that in the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 50 The term used in the Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (11) is when acting under the Summary Jurisdiction Acts etc but the word acting has been held to be limited by the meaning of the same word as used in the earlier and superseded definition *et* to mean only acting in the exercise of their powers of summary jurisdiction (*Boulter v Kent Justice* [1897] A C 556 per Lord HERSCHHELL at p 571 *Hagmarer v Ville des Oiseiers* [1904] 2 K B 316 and see title INTOXICATING LIQUORS Vol XVIII p 87) As to the powers of a single justice see p 573 *post*

(a) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (1)

(b) *Ibid* s 20 (2) As to petty courts for the trial of children see title INFANTS AND CHILDREN Vol XVII p 178

(c) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (4) (5) The appointment of occasional court houses may be made and varied from time to time at a court of petty sessions notice of which must be given to all the justices of the petty sessional division Public notice of the places so appointed is to be given by the justices in such manner as they think expedient (*ibid*)

(d) *Ibid* As to the limits of their powers at such court house see *ibid* s 20 (7)

(e) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (8) They may also be heard on days to which the court held on appointed days is adjourned (*ibid*) The manner in which notice is to be given is in the discretion of the justices (*ibid*)

(f) See p 567, *ante*

(g) See Wharton's Law Lexicon *sub voce* Sessions and as to quorum and adjournment, see title COURTS Vol IX p

## PART V. PETTY SESSIONS AND SINGLE JUSTICES

They are held in and for the various petty sessional divisions (h), and the place at which they are to be held may be determined by the justices (i) but it must not be on premises licensed for the sale of intoxicating liquors (k). Although they are frequently spoken of as special sessions of justices, they are to be distinguished from a petty sessional court or a court of summary jurisdiction (l).

SHOW, 4<sup>th</sup>  
Special  
Sessions  
Where held  
Notice.

**1188** Special sessions of the justices in each petty sessional division are ordered to be held as follows —

Special  
sessions

A general annual licensing meeting (m) and not less than four, nor more than eight, transfer sessions (n)

Brewster  
sessions

The grant or transfer of billiard licences is determined at the general annual licensing meeting and the special sessions for the transfer of licences for the sale of intoxicating liquors respectively (o)

Billiard  
licences

In places where the Public Health Acts Amendment Act 1890 (p) has been adopted licences for places used for music and dancing may be granted by the justices of a petty sessional division at their general annual licensing meeting, or at any special sessions convened with fourteen days' notice (p)

Music and  
dancing  
licences

**1189** The powers formerly exercised by the justices in special sessions in regard to the licensing of places for the performance of stage plays have been transferred to the county councils (q)

Licensing of  
theatres etc

(h) Division of Counties Act 1828 (9 Geo 4 c 43) Petty Sessional Divisions Act 1836 (6 & 7 Will 4 c 12)

(i) Notice must be given unless dispensed with by statute (see p 570 *post*). It is sufficient if the notice is signed by one of the justices usually residing in and acting for the division see County Rates Act 1844 (7 & 8 Vict c 33) s 7 High Constables Act 1869 (32 & 33 Vict c 47) s 3 title COURTS Vol IX p 86

(l) Licensing (Consolidation) Act 1910 (10 Edw 7 & 1 Geo 5 c 24) s 83

(l) Compare *Boulter v Kent Justices* [1897] A C 556 *Hagmarer v Willesden Overseers* [1904] 2 K B 316. They more resemble a public authority who are allowed to act on their own knowledge without being bound and fettered by the ordinary rule of a court of summary jurisdiction (*Hagmarer v Willesden Overseers supra per Lord ALVERSTONE C J* at p 320)

(m) Licensing (Consolidation) Act 1910 (10 Edw 7 & 1 Geo 5 c 24) s 10. The day, hour and place must be settled at a petty sessions held not less than twenty-one days before the meeting and a precept for the meeting must be signed by a majority of the justices present. Public notice as well as notice to all the justices acting for the petty sessional division is to be given by the high constable to whom the precept is directed (*ibid*) see generally as to adjournment and other relative matters title INTOXICATING LIQUORS Vol XVIII pp 21-22

(n) See *ibid* pp 23-42 and note (h) p 563 *ante*

(o) Gaming Act 1845 (8 & 9 Vict c 109) s 10

(p) 5 & 54 Vict c 59 s 51. Such matters are regulated in London by the London County Council and in places within twenty miles of London but outside the county council area by the justices in quarter sessions assembled (Disorderly Houses Act 1751 (25 Geo 2 c 36) s 2). In many boroughs where the Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) has not been adopted there are local Acts regulating the grant of licences. For form of music and dancing licence see *Encyclopædia of Forms and Precedents* Vol XI p 9. See generally title THEATRES AND OTHER PLACES OF ENTERTAINMENT

(q) Local Government Act, 1888 (51 & 52 Vict c 41) s 7 (a)

**SECT 4**  
**Special**  
**Sessions**

but may be delegated by them to the justices of the county sitting in petty sessions (r) as may also the powers which were formerly exercised by the justices in petty sessions in regard to explosives, but which are now transferred to the county council (s)

**Licensed**  
**houses for**  
**lunatics**

**1190** In every quarter sessions borough special sessions of the justices are to be held at the same time as the quarter sessions for the borough for the licensing of houses for the reception of lunatics in all parts of the county not within the immediate jurisdiction of the Lunacy Commissioners (t) Such a meeting is to be held in October for the annual appointment of visitors of the houses so licensed, but other appointments may be made by the justices at any special session which is held at the same time as the quarter sessions for the borough (u)

**Highway**  
**Acts**

Not less than eight nor more than twelve special sessions must be held for the purposes of the Highway Acts (a) The dates are fixed at a special session which must be held within the fortnight following the 20th March (b) Notice to all the justices is dispensed with by statute (c)

**Rating**  
**appeals**

There must also be four sessions held every year for the hearing of rating appeals but the question of the liability of any particular place to be rated is excluded from the justices jurisdiction which is limited to the true value of the particular place and the fairness of the amount at which it is rated Public notice of the sessions must be given twenty eight days beforehand (d)

**Re formation**  
**of jury list**

A special petty sessions for the re formation of the jury list (e) is held once a year within the last seven days of September Notice of it is required to be given by the clerk to the justices to the churchwardens and overseers of every parish and township (f)

**Appointment**  
**of parish**  
**constables**

A special petty sessions for the appointment of parish constables (g) is held once a year between the 24th March and the 9th April in

(r) Local Government Act 1888 (51 & 52 Vict c 41), ss 28 36 (1) The effect of these provisions is to give the county justices jurisdiction where the powers are delegated in any borough that is not a county of itself For a list of the e see Local Government Act 1888 (51 & 52 Vict c 41) Sched III see the Theatres Act (6 & 7 Vict c 68) s 5 and see generally title THEATRES AND OTHER PLACES OF ENTERTAINMENT

(s) Local Government Act 1888 (51 & 52 Vict c 41) s 7 (b) and see generally title EXPLOSIVES Vol XIV p 360

(t) Lunacy Act 1890 (53 & 54 Vict c 5) ss 208 209 see title LUNATIC AND PERSONS OF UNSOUND MIND pp 474 *et seq ante* As to the places within the immediate jurisdiction of the Lunacy Commissioners see Lunacy Act 1890 (53 & 54 Vict c 5) Sched III title LUNATICS AND PERSONS OF UNSOUND MIND p 466 *ante*

(u) *Ibid* p 468

(a) Highway Act 1835 (5 & 6 Will 4 c 50) s 45 and see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 96 97 113 130 146 147 171 and see further *ibid* p 25 note (b)

(b) Highway Act 1835 (5 & 6 Will 4 c 50) s 45

(c) *Ibid*

(d) Parochial Assessment Act 1836 (6 & 7 Will 4 c 96) s 6 and see title RATE AND RATING

(e) Juries Act 1825 (6 Geo 4 c 50) s 10 and see title JURIES Vol XVIII p 234 The Act is applied to the County of London by the Local Government Act 1888 (51 & 52 Vict c 41) s 59

(f) Juries Act 1825 (6 Geo 4 c 50) s 10

(g) Parish Constables Act 1842 (5 & 6 Vict c 109) s 1

every petty sessional division of a county, notice of which must be given to any justice acting in the division. A precept is to be issued by the justices within the first seven days of February in each year directing the overseers of each parish to prepare a list of persons qualified to act as parish constables (*h*)

SECT 4  
Special  
Sessions

#### SECT 5 — Powers Exercisable at Petty or Special Sessions

**1191** The administrative powers of justices to be exercised by them for each petty sessional division but not necessarily in special sessions extend to the following matters —

Administra-  
tive powers

(1) the appointment of overseers in all places in regard to which the power has not been transferred to the local council (*i*) to be made by two or more justices on or within fourteen days after the 25th March in each year (*h*)

Appointment  
of overseers

(11) the appointment of special constables which in boroughs is to be made by two or more justices having jurisdiction therein by precept signed by them in October every year and to include so many of the inhabitants as they think fit (*l*) and in counties by two or more justices usually acting in any division whenever disturbances have taken place or are apprehended and they consider the existing police force insufficient (*m*)

Appointment  
of special  
constables

(111) certain powers of justices under the Highway Acts (*n*)

Powers under  
Highway  
Acts

## Part VI — Jurisdiction of Courts of Summary Jurisdiction and Single Justices

### SECT 1 — In General

**1192** The judicial powers of justices are mainly exercised in criminal matters but are extended by statute in some cases to civil proceedings

Extent of  
powers

Their powers in regard to criminal matters are of two kinds

(1) To hear try determine and adjudge matters which may be summarily dealt with (*o*) and

(1) In criminal  
matters

(2) To inquire into matters where it is alleged that an indictable

(*h*) Parish Constables Act 1842 (5 & 6 Vict c 109) s 2. Certain persons are exempted from being called upon to serve (*ibid* s 6) see generally title POLICE

(*i*) As to the appointment of overseers by other authorities i.e. the parish council urban council and rural district council see title LOCAL GOVERNMENT pp 246 267

(*h*) Poor Relief Act 1601 (43 Eliz c 2) Poor Law (Overseers) Act 1814 (54 Geo 3 c 91)

(*l*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 196 (1) Certain persons are however exempt see further title POLICE

(*m*) Special Constables Act 1831 (1 & 2 Will 4 c 41) s 1 see generally, title POLICE

(*n*) See note (*a*) p 570 *ante* see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 96 97 113 130 146 147 171

(*o*) Compare Summary Jurisdiction Act 1879 (42 & 43 Vict c 49), s 20 (1) see p 589 *post*

**SECT 1**  
**In General.**

offences, which may not be summarily dealt with, has been committed by a person who has been brought up before them, and to commit for trial the alleged offender if it appears to them that the evidence has raised a strong or probable presumption of his guilt (*p*)

**SECT 2—In Preliminary Matters**

**Preliminaries**

**1193** It is the duty of justices to receive informations or complaints to issue summonses or warrants thereon and generally to do all necessary acts and matters preliminary to the hearing both in criminal offences whether summarily punishable or not (*q*) and in such civil business as is assigned to them (*a*) These preliminary acts are not required to be performed in open court (*b*)

**SECT 3—Over Offences not Summarily Punishable**

**Offences not  
summarily  
punishable**

**1194** When a person charged with having committed an offence not summarily punishable is brought before justices their duty is not to decide upon his innocence or guilt but to determine, on hearing the evidence for the prosecution and that for the defence, if any whether the case is one in which he should be put upon his trial (*c*) They are not therefore, a court of judgment when so acting and the proceedings need not apparently be held in open court (*d*)

**SECT 4—Over Offences Summarily Punishable**

**Offences  
summarily  
punishable**

**1195** The duty of justices in criminal matters which may be tried summarily is to hear, try, determine and adjudge the cases brought before them (*e*) This must be done when sitting in open court (*f*) The justices are then a court of summary jurisdiction and may hear and determine a case either in a petty sessional court house or an occasional court house (*g*) If

(*p*) See p 611 *post* and title CRIMINAL LAW AND PROCEDURE Vol IX pp 311—328

(*q*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) Indictable Offences Act 1848 (11 & 12 Vict c 42) see pp 589 611 *post* respectively

(*a*) See p 609 *post*

(*b*) They are usually done by a single justice see p 575 *post*

(*c*) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 25 see *R v Carden* (1879) 5 Q B D 1 *per* COCKBURN CJ at p 6

(*d*) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 19 The law officers of the Crown advised on 1st December 1884 that in view of the definition of court of summary jurisdiction in the Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 7 (now repealed and replaced by a similar definition in the Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (1)) justices even when taking an examination must sit in open court but this opinion would probably be modified in view of the judgment of the House of Lords in *Boulter v Kent Justices* [1897] A C 556 571 *per* Lord HERSHELL where it was decided that the definition in question relates purely to matters pertaining to the summary jurisdiction of magistrates see also title CRIMINAL LAW AND PROCEDURE Vol IX p 312

(*e*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (1)

(*f*) *Ibid*

(*g*) *Ibid* s 20 (2) As to the meaning of these terms see pp 565, 569 *ante*

in the former, they are a court of petty sessions<sup>(h)</sup>, if in the latter, they are not such a court, and in the event of any matter being so heard their powers are limited to the imposition of a period of imprisonment not exceeding fourteen days or a fine not exceeding 20s<sup>(i)</sup>, but they may, without prejudice to any other powers of adjournment adjourn the hearing to the next practicable sitting of a petty sessional court<sup>(k)</sup> Indictable offences that may be dealt with summarily must, however, be heard and determined before a court of petty sessions upon a day appointed for the purpose, or upon some day to which such court is adjourned<sup>(l)</sup>

**Summary  
Over-  
Offences  
Summarily  
Punishable**

#### SECT 5—*In Civil Matters*

**1196** To hear and determine the civil matters assigned to them the justices sit as a court of summary jurisdiction<sup>(m)</sup> and in some cases must do so in petty sessions<sup>(a)</sup>

**In civil  
matters.**

#### SECT 6—*Powers of a Single Justice*

**1197** A single justice other than the Lord Mayor or an Alderman of the City of London<sup>(b)</sup> or a metropolitan police<sup>(b)</sup> or other

**Powers  
conferred by  
statute**

(h) Interpretation Act 1869 (52 & 53 Vict c 63) s 13 (12)

(i) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (7)

(j) *Ibid* s 20 (11)

(l) *Ibid* s 20 (8)

(m) The fact that the amount which justices may order to be paid is limited when they do not sit at a petty sessional court results in practice in their always hearing civil matters at such a court see the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (7)

(a) Thus they must do so in matters relating to (1) bastardy see title **BASTARDY** Vol II pp 447--449 (2) orders under the Highway Acts see generally title **HIGHWAYS** **SIRELS AND BRIDGES** Vol XVI pp 96 97 113 130 146 147 171 (3) orders for possession under the Small Tenements Recovery Act 1838 (1 & 2 Vict c 74) s 1 see generally title **LANDLORD AND TENANT** Vol XVIII pp 559--561 for form of notice to proceed before justices for possession of small tenement see *Encyclopedia of Forms and Precedents* Vol VII p 689 But they need not do so in hearing claims or applications for (1) compensation under the Lands Clauses Consolidation Act 1845 (8 & 9 Vict c 18) s 22 24 see generally title **COMPULSORY PURCHASE OF LAND AND COMPENSATION** Vol VI p 77 (2) damages under the Dogs Act 1906 (6 Ldw 7 c 32) s 1 (3) see generally title **ANIMALS** Vol I pp 398 *et seq* (3) damages under the Harbours Docks and Piers Clauses Act 1847 (10 & 11 Vict c 27) see generally title **WATERS AND WATERCOURSES** (4) separation orders under the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict c 39) see generally title **HUSBAND AND WIFE** Vol XVI pp 596 *et seq* (5) recovery of civil debts in respect of which they have jurisdiction see Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 35 In disputes between employers and workmen the jurisdiction of justices under the Employers and Workmen Act 1875 (38 & 39 Vict c 90) ss 4 5 10 must be exercised in petty sessions except in the case of the Lord Mayor or an Alderman of the City of London or a metropolitan police or other stipendiary magistrate see generally title **MASTER AND SERVANT** The jurisdiction of justices under the poor law need not in general be exercised in petty sessions but orders made for the relief of poor persons upon their parents etc must be made at petty sessions see, generally, title **POOR LAW**

(b) As to his powers, see p 575, *post*



§ 6  
Powers of a  
Single  
Justice

Indictable  
offences

stipendiary magistrate (c) though not invested with the authority of a court composed of two or more justices has certain powers assigned to him by statute

In the case of indictable offences he may receive a charge or complaint and issue his warrant or summons for the alleged offender to be brought before him or any other justice or justices for the same county or borough (d) and he may also issue his summons or warrant for the attendance of witnesses (e). He has the same powers as a court of two or more justices both at the hearing and in respect of the removal of prisoners admitting them to bail and committing them for trial (f) but if the whole evidence given before him is such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge he must order the alleged offender to be detained in custody until he can be brought before two or more justices (g).

Summary  
jurisdiction

**1198.** In the exercise of summary jurisdiction powers a single justice is empowered to receive any information or complaint and to grant a summons or warrant thereon to issue his summons or warrant to compel the attendance of witnesses and to do all other necessary acts and matters preliminary to the hearing (h).

Special  
matter

He is entitled to hear and determine and adjudge such matters as are prescribed by statute (i) whether he was the justice who received the information or complaint or not (l) but whether sitting in a petty sessional court house or not he may not impose a period of imprisonment exceeding a fortnight nor a fine exceeding 20s. (l).

While acting in execution of his powers of summary jurisdiction he is a court of summary jurisdiction (m) but he cannot constitute a court of petty sessions (n) and cannot therefore deal with any indictable offence that may be summarily dealt with (o).

Supplemental  
powers

**1199** After the hearing or determination of the case a single justice is empowered to issue all warrants of distress or commitment

(c) As to his powers see p. 579 *post*

(d) Indictable Offences Act 1848 (11 & 12 Vict. c. 42) ss. 1 *et seq.* see also title CRIMINAL LAW AND PROCEDURE Vol. IX pp. 290 *et seq.*

(e) Indictable Offences Act 1848 (11 & 12 Vict. c. 42) s. 16

(f) *Ibid.* ss. 20—25

(g) Criminal Law Act 1926 (7 Geo. 4 c. 64) s. 1 which in this respect is not repealed

(h) Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) s. 29

(i) *Ibid.* s. 12 Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) s. 20 (9). Statutes which provide for the jurisdiction of a single magistrate are Profane Oaths Act 1745 (19 Geo. 2 c. 21) s. 3 Places of Religious Worship Act 1812 (22 Geo. 3 c. 155) s. 12 Vagrancy Act 1824 (5 Geo. 4 c. 83) s. 3 Game Act 1831 (1 & 2 Will. 4 c. 32) ss. 30, 31, 33 Highway Act 1835 (5 & 6 Will. 4 c. 50) ss. 94 *et seq.* Bread Act 1836 (6 & 7 Will. 4 c. 37) s. 4 *et seq.* Railway Regulation Act 1840 (3 & 4 Vict. c. 91) ss. 13, 16 Larceny Act 1861 (24 & 25 Vict. c. 96) ss. 12—15, 23, 24, 33, 36 Malicious Damage Act 1861 (24 & 25 Vict. c. 97) ss. 22—24, 25, 37, 41, 52.

(k) Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) s. 19

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) s. 20 (7)

(m) Interpretation Act 1889 (52 & 53 Vict. c. 63) s. 13 (11)

(n) *Ibid.* s. 13 (12)

(o) Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) s. 20 (8)

whether he was the justice or one of the justices who sat to hear and determine it or not (p)

SECT 6  
Powers of a  
Single  
Justice  
—  
Civil matters

**1200** A single justice is not empowered to hear and determine such civil matters as are assigned to the jurisdiction of justices but should adjourn them to the next practicable sitting of a court of petty sessions (q). He may however do all necessary acts preliminary to the hearing and the justice who does such acts need not as a rule (r) be a member of the court that hears the case.

SECT 7—*Powers of the Lord Mayor and Aldermen of the City of London*

**1201** The Lord Mayor or an Alderman of the City of London has the powers of any other justice of the peace (s) and in addition when sitting at the Mansion House or Guildhall Justice Room constitutes a court of summary jurisdiction and a court of petty sessions with the power to do alone any act which ordinarily requires the presence of more than one justice (t).

Powers to act  
alone

SECT 8—*Special Powers of Metropolitan Police Magistrates*

**1202** A metropolitan police magistrate when sitting at a police court in the Metropolitan Police District constitutes a court of summary jurisdiction and a court of petty sessions with power to do alone any act which in the case of other justices requires the presence of more than one justice (a).

General  
power to act  
alone

**1203** The following special powers are also conferred upon him by statute (b) —

Special  
powers

He has the same powers as other magistrates in respect of granting a warrant or summons to secure the appearance before him of an alleged offender (c) or the attendance of witnesses (d).

(p) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 29

(q) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (11) compare Bastardy Laws Amendment Act 1873 (36 & 37 Vict c 3) s 7

(r) But see title BASTARDY Vol II p 46

(s) See p 573 *ante*

(t) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 30 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 34 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (10) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (2). The right though expressly given by these statutes is very ancient compare Poor Relief Act 1601 (43 Eliz c 2) s 7. To hear cases arising under the City of London Ballot Act 1887 (50 & 51 Vict c 31) two magistrates of the City are required to sit either at the Mansion House or Guildhall Justice Room and see title METROPOLIS.

(a) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 29 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 33 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (10) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (13) see also Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 14

(b) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) and the other Acts with which by *ibid* s 55 it is directed to be read i.e. the Metropolitan Police Acts 1829 (10 Geo 4 c 44) and 1839 (2 & 3 Vict

47)

(c) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 19

(d) *Ibid* s 22

SECT 8  
Special  
Powers of  
Metropolitan Police  
Magistrates

Remand

Bail

Costs

Amends

Penalty

but his warrant in respect of any matter arising within the Metropolitan Police District may be served or executed outside it by the constable or constables to whom the warrant is directed without indorsement (e) He has concurrent powers with those given to other justices in regard to remand and bail in the case of indictable offences (f) He may award costs on the hearing of any charge or complaint (g), and may order amends up to the amount of £5 to be made where the prosecutor does not proceed further after laying an information or where if he does proceed there was no sufficient ground for making the charge (h) Where an offender is convicted before him he has power to mitigate the penalty prescribed by statute in such manner as he thinks fit (i) but in certain cases the consent of the Inland Revenue Commissioners or Commissioners of Customs and Excise is required (k)

Informers

**1204** Where an information has been laid before a metropolitan police magistrate by a common informer who is not a party aggrieved under any Act which provides that a fixed part of the fine to be imposed shall be paid to the informer the magistrate may in his discretion reduce the amount to be so paid or withdraw it altogether (l)

Stolen goods  
etc

**1205** A metropolitan police magistrate before whom information is given upon oath that there is reasonable ground for suspecting that goods which have been unlawfully obtained are concealed in any place may grant a warrant for entry to be made at any time of day or night with the use of force if necessary to search for the goods and to bring before him every person found in the place who may be suspected of being privy to the concealment (m)

If any person is brought before a metropolitan police magistrate charged with possessing or conveying in any manner goods which may be reasonably suspected of having been stolen or unlawfully obtained, and such person is unable to account satisfactorily for

(e) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 17

(f) *Ibid* s 36 see Indictable Offences Act 1848 (11 & 12 Vict c 42) s 21

(g) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 31

(h) *Ibid* s 32

(i) *Ibid* s 35 compare Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 4 under which however the mitigation of the amount of a fine prescribed by statute is limited to the case of a first offence and see p 603 *post* *Quare* whether a metropolitan police magistrate would be entitled to reduce a fine prescribed by a subsequent Act to be not less than a named sum see *Osborn v Wood Brothers* [1897] 1 Q B 197 cited p 603 *post*

(k) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 35 Finance Act 1908 (8 Edw 7 c 16) s 4 Excise Transfer Order 1909 15th February (*London Gazette* 1909 16th February 1212) compare the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 53 and see the Customs and Inland Revenue Act 1878 (41 & 42 Vict c 15) s 23

(l) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 34 If such an informer directly or indirectly receives money or reward for compounding, delaying or withdrawing the information without the magistrate's consent he is liable to a penalty of £10 (*ibid* s 33) and if he obtains money by a threat of laying an information or as an inducement for forbearing from laying one he is liable to the same penalty (Metropolitan Police Courts Act 1840 (3 & 4 Vict c 84) s 11)

(m) Metropolitan Police Courts Act, 1839 (2 & 3 Vict c 71), s 25

SECT 8  
Special  
Powers of  
Metropoli-  
tan Police  
Magis-  
trates

his possession of the goods he is liable to a fine not exceeding £5 or to imprisonment with or without hard labour for any period not exceeding two months (n). Further, where a person charged with such an offence alleges that he received the goods from some other person or that he was employed by some other person as a carrier, agent, or servant a metropolitan police magistrate may cause to be brought before him every person through whose hands the goods passed and may examine such persons imposing upon any person whom he determines to have had possession of the goods having reasonable cause to believe they were stolen or unlawfully obtained a fine not exceeding £5 or a term of imprisonment not exceeding three months with or without hard labour (o).

**1206** A metropolitan police magistrate has power to make an order for the delivery to their owner of goods which have been stolen or unlawfully obtained or which though lawfully obtained have been unlawfully deposited pawned pledged sold or exchanged (p).

Delivery and  
restitution  
orders

A metropolitan police magistrate may also summon before him any person within the limits of the Metropolitan Police District upon complaint being made to him by the owner of goods that they are being unlawfully detained by such person and after making inquiry into the facts the magistrate may make an order for the delivery of the goods to the owner either absolutely or upon terms (q) but the power is limited to goods of no greater value than £15 and

(n) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 24. This provision extends however only to the possession of goods in transit and not to their possession in a house or shop (*Hudley v Ierl's* (1866) L R 1 Q B 444).

(o) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 26. The possession by a carrier agent or servant in such a case is to be deemed to be the possession of the employer (*ibid*).

(p) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) ss 27 28. Upon complaint being made the magistrate may issue a summons or warrant for the appearance before him of the broker or dealer with whom the goods were deposited and the production of the goods. He may then order them to be delivered to the owner either without payment or on payment of such sum and at such time as he may determine. Should the broker or dealer refuse to deliver up the goods or dispose of them after notice that they were stolen or unlawfully obtained the magistrate may determine the full value of the goods and order him to pay it to the owner but the broker or dealer may within six months of the magistrate's order commence an action for the recovery of goods from the person to whom they were delivered under the order (*ibid* s 27). An order may be made for the restitution of goods with or without compensation after a summary conviction or where the goods are produced without a warrant being first issued (*ibid* s 28). As to such dealings with goods generally see titles PAWNS AND PLEDGES SALE OF GOODS TROVER AND DETINUIT. As to the powers of such magistrate in proceedings for recovery of deserted premises see title LANDLORD AND TENANT Vol XVIII p 561 note (m).

(q) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 40. The expression goods will cover anything that for example would be included in such a phrase as 'I give and bequeath all my worldly goods' in a will (*E v Slade* (1888) 21 Q B D 433 *per* MANISTY J at p 435). If the person detaining the goods has a lien or right to detain them by way of security for the payment of money or the performance of any act by the owner the magistrate may determine the amount of money due and order its payment as part of the terms or order the performance or tender

## SECT 8

Special  
Powers of  
Metropoli-  
tan Police  
Magis-  
trates

Compensation  
orders  
for malicious  
damages

does not extend to muniments, deeds, or papers relating to property of greater value than £10 (i)

The powers of a metropolitan police magistrate of making orders with respect to property in the possession of the police are applicable to the jurisdiction of justices throughout the country (a)

**1207** A metropolitan police magistrate may make an order for the payment of any sum up to £15 by the present or former occupier of any house or lodging within the Metropolitan Police District for wilful and malicious damage done by him to the premises or the furniture therein (other than his own) by way of compensation to the landlord or any other party aggrieved upon complaint being made by the aggrieved party within one month of the commission of the offence or the termination of the occupation (b)

for illegal  
distress

**1208** In the case of houses or lodgings let by the week or month at a rent not exceeding a total of £15 per annum a metropolitan police magistrate may summon a landlord or his broker or agent upon complaint being made by the tenant that his goods have been subjected to unlawful irregular or excessive distress and if the complaint appears to him just he may make an order for the return of the goods if unsold or if sold for the payment to the tenant of such balance as he may find to be due after deduction of the rent (c) If such order is not complied with the magistrate may enforce payment to the aggrieved party of compensation up to the amount of £10 (d)

Orders for  
wages

**1209** A metropolitan police magistrate is empowered to hear disputes as to wages or money due to labourers employed in or upon the river Thames or the docks, creeks, wharfs, quays or places adjacent thereto and to make an order for so much wages or money up to £5 as shall appear to him to be due besides the reasonable costs of the prosecution of the complaint but places in the City of London are expressly excepted from his jurisdiction (e)

Further  
powers

**1210** A metropolitan police magistrate is also empowered to act with an assessor of nautical and pilotage experience in the hearing of appeal of pilots from the decision of a pilotage authority for any place within the Metropolitan Police District (f) and a metropolitan police magistrate is also the authority to determine any difference arising under the Telegraph Acts (g) between the Postmaster General and any person or body of persons having any power jurisdiction or

of the performance of any act due by the owner or where such act cannot be performed order the tender of amends for its non performance (Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 40)

(r) *Ibid*

(a) Police (Property) Act 1897 (60 & 61 Vict c 30) repealing and superseding Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) ss 29-30 see p 608 *post* and title FORCE

(b) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 38

(c) *Ibid* s 39

(d) *Ibid*

(e) *Ibid* s 37

(f) Merchant Shipping Act 1894 (57 & 58 Vict c 60) s 610 see generally title SHIPPING AND NAVIGATION

(g) Telegraph Act, 1875 (41 & 42 Vict c 76) ss 4-5 see also the

control over a street or public road, or having power to give or withhold consent to the placing of telegraph posts in, under, upon, or along a street or public road within the Metropolitan Police District (*h*)

### SECT 9—*Special Powers of Stipendiary Magistrates*

**1211** A stipendiary magistrate when sitting at a police court or other place appointed in that behalf constitutes a court of summary jurisdiction and a court of petty sessions with power to do alone any act which in the case of other justices requires the presence of more than one justice (*i*)

He has the same powers in regard to places within his district as metropolitan police magistrates have within the Metropolitan Police District (*h*) for the hearing of the appeal of pilots (*j*), and the determination of differences under the Telegraph Acts (*k*)

SECT 8  
Special  
Powers of  
Metropoli-  
tan Police  
Magis-  
trates

Lower to  
act alone

Special  
powers

## Part VII—Indictable Offences and Offences Punishable Summarily

### SECT 1—*What are Indictable Offences*

**1212** All matters which are public offences at common law and all matters which are forbidden by statute with or without a general prohibitory clause but without the provision of a particular remedy of another kind are the proper subjects of indictment (*l*)

Where a matter is made punishable by statute and a particular remedy is prescribed then the prescribed remedy must be employed to the exclusion of the remedy by indictment but if in such case the remedy by indictment already exists then the prescribed remedy and the remedy by indictment are cumulative and either may be employed (*m*)

The question whether a matter is one into which magistrates should inquire and after inquiry commit the defendant for trial

What are  
indictable  
offences

General rule  
as to dis-  
tinction

Telegraph Act 1863 (26 & 27 Vict c 112) and generally in TELEGRAPHS AND TELEPHONE

(*h*) See p 548 *ante*

(*i*) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 29 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 33 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (10) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (13) see also Petty Sessions Act 1849 (12 & 13 Vict c 18) s 1 Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 1

(*j*) Merchant Shipping Act 1894 (57 & 58 Vict c 60) s 610 see note (*f*) p 578 *ante*

(*k*) Telegraph Act 1878 (41 & 42 Vict c 76) ss 4 5 see note (*g*) p 578 *ante*

(*l*) 2 Hawk P C c 25 s 4 private wrongs except in some way they concern the King are not indictable (*ibid*) As to the effect of a general and a particular prohibitory clause see *R v Wright* (1758) 1 Burr 543 *per* Lord MANSFIELD C J at p 544 see also title CRIMINAL LAW AND PROCEDURE Vol IX pp 333 334

(*m*) 2 Hawk P C c 25 s 4 see *R v Robinson* (1759) 2 Burr 799 *per* Lord MANSFIELD C J at p 803 see also *R v Boyall* (1759) 2 Burr 832, and *R v Hall* [1891] 1 Q B 747

**SECT 1**  
**What are**  
**Indictable**  
**Offences**

elsewhere if they think fit (n), or whether it is one which it is their duty to hear and determine themselves (o) is *prima facie*, decided by the point whether the matter is indictable or not

There are however, cross divisions as in some cases there is provision by statute for the summary trial of indictable offences (p) and in others for matters ordinarily the subject of summary jurisdiction, to be treated as if they were indictable (q)

**SECT 2—Indictable Offences Triable Summarily**

**SUB SECT 1—Offences by Children**

Discretion  
as to pro-  
cedure

**1213** Any indictable offence other than one of homicide which is committed by a child (r) over the age of seven and under the age of fourteen may be tried summarily if the justices before whom the child is brought think it expedient, and if the parent or guardian of the child when informed by the justices of his right to have the child tried by a jury does not object to the child being dealt with summarily (s)

The justices may exercise their discretion to try the case summarily at any time during the hearing at which the evidence satisfies them that it is expedient to do so (t) but upon doing so they must cause the charge to be reduced into writing and must read it to the parent or guardian of the child and inquire whether such parent or guardian objects to the case being dealt with summarily (u) The parent or guardian, if he resides within a reasonable distance must attend the court during the whole of the proceedings unless to require his attendance would be unreasonable (v)

In the event of his not attending the justices may if they think it just to do so remind the child so as to give the parent or guardian opportunity to attend or if they think it expedient deal with the case summarily (x)

(n) See p 611 *post*

(o) See p 589 *post*

(p) See the text *infra*

(q) See p 587 *post*

(r) As to the capacity of children to commit crime see title CRIMINAL LAW AND PROCEDURE Vol IX p 239

(s) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 10 (1) If it appears to the court that any person brought before them is a child or young person they are to take such evidence as may be forthcoming for that purpose at the hearing and are to proceed on the view they take of such evidence Proof subsequently obtained that the view taken by them was wrong does not invalidate any order or judgment made by them (Children Act 1908 (8 Edw 7 c 67) s 123 (1)) As to the course to be followed in regard to charges against children generally see title INFANTS AND CHILDREN Vol XVII pp 176 *et seq* As to Juvenile Courts see *ibid* p 177

(t) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 10 (1), *R v Hertfordshire Justices* [1911] 1 K B 612 see p 582 *post*

(u) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 10 (2)

(v) Children Act 1908 (8 Edw 7 c 67) s 98 (1) and see further title INFANTS AND CHILDREN Vol XVII p 177 Rules may be made under the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 29 to join a parent's name in a summons addressed to the child (Children Act, 1908 (8 Edw 7 c 67) s 98 (3))

(x) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49), s 10 (3),

**1214** If the case is dealt with summarily the punishment which the justices may inflict is to be of the same description as might have been inflicted if it had been tried on indictment (y) A child may not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs (a) but he may be kept in a place of detention for any time not exceeding one month, which the offence committed may warrant (b)

SECT 2 \*  
Indictable  
Offences  
Triable  
Summarily  
Punishment  
Detention

If a fine is imposed the amount must not in any case exceed £2 (c) If the child is a male, and the justices think it expedient they may, in addition to or instead of any other punishment adjudge him to be whipped with not more than six strokes of a birch rod by a constable (d) The whipping must take place in the presence of an inspector or officer of police of higher rank than constable, and also in the presence if he desire it of the parent or guardian of the child (e) The number of strokes and the instrument used must be specified, and the child may not be whipped more than once for the same offence (f)

Fine.  
Whipping

The justices may also send the child to a reformatory or industrial school (g) or place the child by their order under the supervision of a probation officer (h)

#### SUB SECT 2—Offences by Young Persons

**1215** In the case of young persons i.e. persons between the ages of fourteen and sixteen (i) indictable offences other than homicide may be dealt with summarily if this course seems expedient to the justices and if the young person charged with the offence when informed by the court of his right to be tried by a jury consents to be dealt with summarily (k) The justices may exercise their discretion at any time during the hearing of the case at which they become satisfied by the evidence 'that it is expedient to deal with the case summarily (l)' but they are to have regard to the character and

Discretion  
as to pro-  
cedure

(y) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 10 (1)

(a) Children Act 1908 (8 Edw 7 c 67) s 102 (1)

(b) *Ibid* s 106 As to the meaning of the term place of detention see titles CRIMINAL LAW AND PROCEDURE Vol IX p 422

note (d) INFANTS AND CHILDREN Vol XVII p 177 PRISONS

(c) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 10 (1) (c)

(d) *Ibid* s 10 (1) (d)

(e) *Ibid*

(f) Whipping Act 1862 (25 & 26 Vict c 18) ss 1 2 and see title CRIMINAL LAW AND PROCEDURE Vol IX p 423

(g) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 10 (4) see Children Act 1908 (8 Edw 7 c 67) ss 57—83 and generally titles CRIMINAL LAW AND PROCEDURE Vol IX p 421 EDUCATION Vol XII pp 71 72

(h) Children Act 1908 (8 Edw 7 c 67) s 60 see Probation of Offenders Act 1907 (7 Edw 7 c 17) especially *ibid* s 3 (2) and title CRIMINAL LAW AND PROCEDURE Vol IX p 421

(i) Children Act 1908 (8 Edw 7 c 67) s 131 As to the course to be followed in regard to charges against young persons generally see title INFANTS AND CHILDREN Vol XVII pp 176, 177

(k) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49), s 11 (1) Summary Jurisdiction Act 1899 (62 & 63 Vict c 22) s 2

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 11 (2), *R v. Hertfordshire Justices* [1911] 1 K B 612 see p 582, *post*



SECT 2  
Indictable  
Offences  
Triable  
Summarily  
—  
Punishment

antecedents of the person charged the nature of the offence, and all the circumstances of the case (*m*) and they must cause the charge to be reduced into writing and read to the young person before inquiring whether he consents to being dealt with summarily (*n*)

**1216** The justices may, if they find the young person guilty of the offence with which he is charged inflict upon him a fine not exceeding £10 (*o*) or commit him to a place of detention for a period not exceeding one month (*p*) but they may not sentence him to imprisonment nor commit him to prison unless they certify that he is of so unruly or depraved a character that he cannot or is not fit to be sent to a place of detention (*q*) The justices may if they think fit send him to a reformatory or industrial school (*r*) or commit him to the care of a relation or other person selected by them (*a*) or by their order place him under the supervision of a probation officer (*b*)

SUB SECT 3 —Offences by Adults

Option of  
accused

**1217** In the case of adults and persons over the age of sixteen (*c*) certain indictable offences may be dealt with summarily if the course seems expedient to the justices and if the person charged with the offence when informed by them of his right to be tried by a jury, consents to be dealt with summarily (*d*)

Discretion  
as to  
procedure

The justices may exercise their discretion in the same manner and with the same conditions as in the case of young persons at any time until the case has been adjudicated upon (*e*) If they find the person guilty of the offence with which he is charged they may sentence him to imprisonment with or without hard labour for a term not exceeding three months or to the payment of

Punishment

- 
- (*m*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 11 (1)  
 (*n*) *Ibid* s 11 (2)  
 (*o*) *Ibid* s 11 (1)  
 (*p*) Children Act 1908 (8 Ldw 7 c 67) s 106 see title CRIMINAL LAW AND PROCEDURE Vol IX p 422  
 (*q*) Children Act 1908 (8 Ldw 7 c 67) s 106 (3) If they do sentence him to imprisonment with such a certificate the term may be for any period not exceeding three months with or without hard labour (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 11 (1))  
 (*r*) Children Act 1908 (8 Ldw 7 c 67) ss 57—83 see generally titles CRIMINAL LAW AND PROCEDURE Vol IX p 421 EDUCATION Vol XII pp 71 72  
 (*a*) Children Act 1908 (8 Ldw 7 c 67) s 60  
 (*b*) *Ibid* see the Probation of Offenders Act 1907 (7 Ldw 7 c 17) especially *ibid* s 3 (2)  
 (*c*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 49 The justices are entitled to take evidence at the hearing as to the age of a person who might be under the age of sixteen and if upon the evidence the person appears to them to be over the age of sixteen he is deprived of the benefit of the provisions of the Children Act in favour of young persons (Children Act 1908 (8 Ldw 7 c 67) s 123 (1))  
 (*d*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 12  
 (*e*) See p 581 *ante* This is so even where the defendant has consented to the case being dealt with summarily and evidence has been given by him on that understanding without receiving the caution (see title CRIMINAL LAW AND PROCEDURE Vol IX p 316) required by the Indictable Offences Act 1848 (11 & 12 Vict c 42), s 18 (*h v Hertfordshire Justices* [1911] 1 K B 612)

a fine not exceeding £20 (*f*) A person who is found guilty by the justices after consenting to be dealt with summarily has no right of appeal to quarter sessions (*g*)

SECT 2.  
Indictable  
Offences  
Triable  
Summarily

**1218** The right to deal summarily with offences against property is limited to cases where the property concerned in the opinion of the justices before whom the charge is brought does not exceed £2 (*h*)

Offences  
against  
property

The offences which may be summarily dealt with are —

- (1) Simple larceny (*i*)
- (2) Offences declared by any Act for the time being in force to be punishable as simple larceny (*k*)
- (3) Larceny from or stealing from the person (*l*)
- (4) Larceny as a clerk or servant (*m*)
- (5) Aiding abetting consulting or procuring the commission of any of the above offences (*n*)
- (6) Attempting to commit any of the above offences (*o*)
- (7) Embezzlement by a clerk or servant (*p*)
- (8) Receiving stolen goods (*q*)
- (9) Obtaining or attempting to obtain by any false pretence from any person any chattel money or valuable security with intent to defraud (*r*)

(10) The offence of unlawfully and maliciously setting fire to any part of any wood coppice or plantation of trees or to any heath gorse furze or fern (*s*)

(11) Offences within the scope of the Inebriates Act 1898 (*t*)

Offences  
committed  
habitual  
drunkard

(*f*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 12

(*g*) *R v London Justices Ex parte Lambert* [1892] 1 Q B 661 *H v Dickinson Ex parte Davis* [1910] 1 K B 469

(*h*) See the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) Sched I col 2 Summary Jurisdiction Act 1899 (62 & 63 Vict c 22), Schedule and as to such offences generally see title CRIMINAL LAW AND PROCEDURE Vol IX pp 627 *et seq*

(*i*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) Sched I col 2

(*k*) *Ibid*

(*l*) *Ibid*

(*m*) *Ibid*

(*n*) *Ibid*

(*o*) *Ibid* In this case the limitation in regard to the value of the property is omitted

(*p*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) Sched I col 2 As to embezzlement see title CRIMINAL LAW AND PROCEDURE Vol IX pp 650 *et seq*

(*q*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) This includes the commission of any of the offences relating to property specified in the Larceny Act 1861 (24 & 25 Vict c 96) ss 91 95 see title CRIMINAL LAW AND PROCEDURE Vol IX pp 676 *et seq*

(*r*) Summary Jurisdiction Act 1899 (62 & 63 Vict c 22) Schedule Larceny Act 1861 (24 & 25 Vict c 96) s 88 see title CRIMINAL LAW AND PROCEDURE Vol IX pp 690 *et seq*

(*s*) Summary Jurisdiction Act 1899 (62 & 63 Vict c 22) Schedule The offence is created by the Malicious Damage Act 1861 (24 & 25 Vict c 97) s 16

(*t*) Inebriates Act 1898 (61 & 62 Vict c 60) s 2 The offences to which this provision relates are set out in *ibid* Sched I

SECT 2  
Indictable  
Offences  
Triable  
Summarily

committed by a habitual drunkard (u) who has been summarily convicted of any such offence at least three times in the preceding twelve months (v)

(12) Committing an indecent assault upon a person, whether male or female who in the opinion of the justices is under the age of sixteen years (a)

Indecent  
assault

Indictable  
offences  
triable at  
option of the  
justices

**1219** Adult persons who plead guilty to any of the above offences with the exception of the last two may be dealt with summarily by the justices before whom they are brought without any limitation in the case of offences connected with property, of the value of the property concerned (b) The justices may at any time during the hearing of the case ask the person charged with any such offence whether he pleads guilty but before doing so they must have become satisfied that the evidence is sufficient to put him upon trial for the offence with which he is charged and that the case is one which may properly be dealt with summarily having regard to his character and antecedents the nature of the offence, and the circumstances generally (c)

Procedure

Charge to be  
reduced to  
writing and  
read

They must also have caused the charge to be reduced to writing and read to the person charged, and must explain to him that he is not obliged to plead or to answer but that if he pleads guilty he will be dealt with summarily and if he does not plead or pleads not guilty he will be dealt with in the usual course by being committed for trial (d)

Warning the  
person  
charged

They must also warn the person charged that he is not obliged to say anything but that whatever he says will be taken down in writing and may be given in evidence against him upon his trial and they are to give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat, which may have been held out to him to induce him to make any admission or confession of his guilt but that whatever he then says is liable to be used in evidence against him on his trial notwithstanding any such promise or threat (e)

Plea of  
guilty

**1220** If the person charged in reply to the justices question pleads guilty the justices must thereupon cause the plea of guilty to be entered and sentence him to be imprisoned with or without

(u) For definition see title CRIMINAL LAW AND PROCEDURE Vol IX p 417 note (p) and generally see *ibid* pp 417 418 title INTOXICATING LIQUORS Vol XVIII pp 159 *et seq*

(v) Inebriates Act 1898 (61 & 62 Vict c 60) s 2 The offences to which this provision relates are set out in *ibid* Sched I

(a) Children Act 1908 (8 Edw 7 c 67) Sched II For this offence the term of imprisonment which may be awarded by the court is extended to six months (*ibid* s 128)

(b) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 13 (1) The offences are to be found set out in *ibid* Sched I col 1 see p 583 *ante*

(c) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 13 (1)

(d) *Ibid* s 13 (2) If they think it desirable they are to explain the meaning of being dealt with summarily or in the usual course and to state the assizes or sessions as the case may be, at which the case will be tried if tried by a jury (*ibid*)

(e) *Ibid*

hard labour for any term not exceeding six months (f) If he does not plead guilty, his answer if any, is to be taken down in writing read over to him, and signed by one of the justices constituting the court (g) It is then to be kept with the depositions of the witnesses and transmitted with them to the proper officer of the court by whom the case is to be tried (h) At the trial it may if necessary, be given in evidence against him without further proof, unless it is shown that the justice purporting to have signed it did not in fact do so (i)

SECT 3  
Indictable  
Offences  
Triable  
Summarily

Plea of not  
guilty

**1221** The justice before whom any person charged with an indictable offence that may be dealt with summarily is brought may adjourn the case and remand him from time to time either before or during the hearing of the case for the purpose of ascertaining whether it is expedient to deal with the case summarily (k) or if at the time of the charge the justices before whom the prisoner charged is brought do not constitute a petty sessional court they may adjourn the case and remand him until the next practicable sitting of a petty sessional court (l)

Adjournment  
and remand

**1222** The rule with regard to procedure in indictable cases that may be dealt with summarily is that the procedure in indictable cases is to be followed until the justices have assumed the power to deal summarily with the matter and after that the procedure in summary jurisdiction (m) The evidence of witnesses taken before the justices assumed such power need not be taken again but any witness may at the defendant's request be recalled for cross examination (n)

Rule as to  
procedure

If the defendant is convicted the effect of the conviction is the same as if it had taken place on indictment (o) and the petty sessional court have the same power to make an order for the restitution of property that any court would have had if the case had

Effect of  
conviction

(f) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 13 (1)

(g) *Ibid* s 13 (3)

(h) *Ibid* Indictable Offences Act 1848 (11 & 12 Vict c 42) s 20  
see title CRIMINAL LAW AND PROCEDURE Vol IX p 321

(i) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 13 (3)

(k) *Ibid* s 24 (1) (a) The mode of exercising the power of remand is the same as that exercised by justices in the hearing of inquiries into indictable offences (*ibid* s 24 (2) Indictable Offences Act 1848 (11 & 12 Vict c 42) s 21) see title CRIMINAL LAW AND PROCEDURE Vol IX p 319

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 24 (1) (b) Such cases cannot be dealt with summarily except by a petty sessional court (*ibid* s 20 (8)) see p 565 *ante* In this case the time during which the person charged may be remanded is not limited to eight days (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 24 (2)) but advantage cannot be taken of this provision in cases where the consent of the person charged or his parent or guardian is required until such consent is given see *ibid* s 27 (1) as to procedure in indictable cases, see title CRIMINAL LAW AND PROCEDURE Vol IX pp 311 *et seq*

(m) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49), s 27 (1)

(n) *Ibid* s 27 (2)

(o) *Ibid* s 27 (3) But justices may not give the option of a fine to

**SECT 2**  
**Indictable**  
**Offences**  
**Triable**  
**Summarily**

Effect of  
dismissal

Filing of  
conviction  
or order

Costs

Indictable  
offence  
triable at  
option of  
the prosecu-  
tion

gone for trial (p) The conviction must contain a statement of the plea of guilty or of the consent of the defendant (or his parent or guardian) to the case being dealt with summarily (q)

If the information on which the defendant is charged is dismissed, the dismissal is of the same effect as the acquittal would have been had the case been tried upon indictment (r) The defendant is entitled to demand a copy of the order of dismissal certified by the court or two of the justices constituting it (s)

The conviction or order of dismissal together with the depositions of witnesses and the statement if any made by the defendant are to be transmitted to the clerk of the peace and filed by him (t)

**1223** The justices may by order direct payment out of the county or borough fund of the costs of the prosecution or defence or both in accordance with the scale approved by the Secretary of State (a)

**1224** By statute certain special offences are made triable summarily or upon indictment at the option of the prosecution

Such are the making of a false claim to pay or pension by a seaman in the royal navy or the personation of a seaman for the purpose of making such claim (b) the like offences in the case of persons serving in the army (c) or other defensive forces of the Crown (d) or in the case of a member of a police force (e) misappropriation of the funds of a trade union (f) or industrial or provident society (g) putting injurious matter into post boxes or sending

an offender and it is doubtful whether the Probation of Offenders Act 1908 (5 Edw 7 c 11) applies to the cases

(p) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 27 (3) see p 606 *post* and title CRIMINAL LAW AND PROCEDURE Vol IX pp 449 684 685 702

(q) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 27 (5)

(r) *Ibid* s 27 (4) and see title CRIMINAL LAW AND PROCEDURE Vol IX p 374

(s) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 27 (4) see Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) 14 and p 601 *post*

(t) Summary Jurisdiction Act 1879 (42 & 43 Vict c 43) s 27 (6) see Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14

(a) Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) s 1 see generally title CRIMINAL LAW AND PROCEDURE Vol IX pp 445 *et seq* This provision replaces the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 28 except in so far as the latter has been applied by other Acts e.g. the Inebriates Act 1899 (62 & 63 Vict c 35) s 1 (Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) Schedule) As to the county and borough funds see title LOCAL GOVERNMENT pp 319 *post ante*

(b) Admiralty Powers etc Act 1865 (28 & 29 Vict c 124) s 6 8 The summary jurisdiction may be exercised by a single justice (*ibid*) see generally title ROYAL FORCES

(c) Army Act 1891 (44 & 45 Vict c 58) s 142 see title ROYAL FORCES

(d) Pensions and Yeomanry Pay Act 1884 (47 & 48 Vict c 55) s 3 see title ROYAL FORCES

(e) Police Act 1890 (53 & 54 Vict c 45) s 9 see title POLICE

(f) Trade Union Act 1871 (34 & 35 Vict c 31) s 12 see title TRADE AND TRADE UNIONS

(g) Industrial and Provident Societies Act 1893 (56 & 57 Vict c 39) s 64 see title INDUSTRIAL PROVIDENT AND SIMILAR SOCIETIES, Vol XVII, p 32

or attempting to send such matter by post (*h*) and offences under the Merchant Shipping Act, 1894, declared by that Act to be misdemeanours (*i*)

SECT 2.  
Indictable  
Offences  
Triable  
Summarily

### SECT 3 — *Summary Offences Triable upon Indictment*

#### SUB SECT 1 — *After a Previous Conviction*

**1225** Certain offences which are ordinarily dealt with summarily are in the case of a second or third offence made punishable on indictment

Summary  
offences  
triable up on  
indictment  
after one  
previous  
conviction

An alleged offender who has been once previously convicted of any of the following offences is to be tried upon indictment — the stealing of deer in an uninclosed part of a forest (*h*) the stealing of dogs (*i*) the possession of stolen dogs (*m*) the stealing of fruit or vegetables from a garden (*n*) malicious damage to fruit or vegetables in a garden (*o*) offences against the Acts relating to the manufacture of hats (*p*)

An alleged offender who has been twice previously convicted of any of the following offences is to be tried upon indictment — the stealing of or malicious damage to growing trees (*g*) night poaching (*a*) disobedience by overseers to the rules made by the Local Government Board (*b*) offences by masters under the Truck Acts (*c*)

after two  
previous  
convictions

(*h*) Post Office Act 1908 (8 Edw 7 c 48) ss 61—63 see title POST OFFICE

(*i*) Merchant Shipping Act 1894 (57 & 58 Vict c 60) s 680 (1) see title SHIPPING AND NAVIGATION

(*l*) Larceny Act 1861 (24 & 25 Vict c 96) s 12 Such a second offence is felony see title ANIMALS Vol I p 371

(*l*) Larceny Act 1861 (24 & 25 Vict c 96) s 18 see title ANIMALS Vol I p 405

(*m*) Larceny Act 1861 (24 & 25 Vict c 96) s 19 see title ANIMALS Vol I p 405

(*n*) Larceny Act 1861 (24 & 25 Vict c 96) s 36 Such a second offence is a felony (see title CRIMINAL LAW AND PROCEDURE Vol IX p 638) and is punishable as in the case of simple larceny (see *ibid* p 627) and therefore if the alleged offender is an adult and pleads guilty or if the property is of value not exceeding £2 and being an adult he gives his consent he may be dealt with summarily (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) Sched I) see pp 583 584 *ante*

(*o*) Malicious Damage Act 1861 (24 & 25 Vict c 97) s 23 Such a second offence is a felony see generally title CRIMINAL LAW AND PROCEDURE Vol IX p 753

(*p*) Frauds by Workmen Act 1748 (22 Geo 2 c 27) s 2 Frauds by Workmen Act 1777 (17 Geo 3 c 56) ss 5 6 9 see title TRADE AND TRADE UNIONS

(*q*) Larceny Act 1861 (24 & 25 Vict c 96) s 33 Malicious Damage Act 1861 (24 & 25 Vict c 97) s 22 The former offence is a felony the latter a misdemeanour see title CRIMINAL LAW AND PROCEDURE Vol IX pp 638 782

(*a*) Night Poaching Act 1828 (9 Geo 4 c 69) s 1 see title GAME Vol XV pp 233 *et seq*

(*b*) Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) s 98 see title POOR LAW

(*c*) Truck Act 1831 (1 & 2 Will 4 c 37) ss 1—3 9 Truck Amendment Act 1887 (50 & 51 Vict c 46) ss 3 6—9 11 Truck Act 1896 (59 & 60 Vict c 44) s 4 see title FACTORIES AND SHOPS Vol XIV p 518

## SECT 3

Summary  
Offences  
Triable  
upon Indict-  
mentSummary  
offences  
triable on  
indictment by  
express  
statutory  
provisionSUB-SECT 2—*In other Cases*

**1226** In some cases (*d*), where an offence is stated to be a mis-  
demeanour the right to try the case upon indictment is expressly  
saved by statute, but the saving would appear to be superfluous as  
the right to try an offence upon indictment if ever established, is  
not lost by the provision of a summary remedy which is not  
expressly stated to be in substitution for it (*e*)

In the case of offences by railway servants against the Rail-  
way Regulation Acts (*f*) the justice before whom the alleged offender  
is brought may either deal with him summarily or commit him  
for trial at quarter sessions (*f*) A justice may also commit any  
person convicted before him as an incorrigible rogue to quarter  
sessions, when the justices in sessions may further imprison  
him (*g*)

SECT 4—*Right of Accused to Trial by Jury*Claim to be  
tried by jury

**1227** In the case of every offence, other than assault the accused  
is entitled to claim to be tried by a jury if the punishment to which  
he would be liable on conviction is a term of imprisonment exceed-  
ing three months in duration (*h*) The claim must however be  
made by the accused on his appearing before the justice and before  
the charge is gone into (*i*)

When made

Duty of  
justices

It is the duty of the justices constituting the court in the case of  
every offence to which the provision applies to inform (*l*) the accused

(*d*) See for example the Tramways Act 1870 (33 & 34 Vict c 78) s 50  
title TRAMWAYS AND LIGHT RAILWAYS and the Sale of Food and Drugs  
Act 1875 (38 & 39 Vict c 63) ss 3 4 title FOOD AND DRUGS Vol XV  
p 33

(*e*) See p 579 *ante* The mere classification of an offence as a mis-  
demeanour in the statute creating the offence is sufficient to establish the  
right to try it upon indictment even though a summary remedy is provided  
thus under the Dentists Act 1878 (41 & 42 Vict c 33) and the Veterinary  
Surgeons Act 1881 (44 & 45 Vict c 62) false representation that a  
person is duly qualified and falsification of the register are offences that  
are triable summarily under the Act or upon indictment see title  
MEDICINE AND PHARMACY

(*f*) Railway Regulation Acts 1840 (3 & 4 Vict c 97) and 1842 (5 & 6  
Vict c 55)

(*g*) Vagrancy Act 1824 (5 Geo 4 c 83) s 5 Idle and disorderly  
persons who have been twice previously convicted as such may be kept in  
prison until quarter sessions and further imprisoned by the justices in  
sessions (*ibid* ss 5 10) This provision is not applicable to women (*ibid*  
s 10) As to vagrancy see further titles CRIMINAL LAW AND PROCEDURE  
Vol IX pp 508 537 692 POOR LAW

(*h*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 17 (1)  
Vagrancy Act 1824 (5 Geo 4 c 83) The provision is limited to cases  
where the actual sentence is for a term of imprisonment exceeding three  
months, and does not apply to cases where such a term could be given  
in default of payment of a fine (*Carle v Elkington* (1892) 67 L T  
314) nor to cases where at the expiration of the original sentence the  
accused would be liable to further imprisonment in default of finding  
security for his not so offending again (*Williams v Wynne* (1885) 57  
L J (M C) 30)

(*i*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49), s 17 (1)

(*l*) *ibid*, s 17 (2).

## PART VII—INDICTABLE AND SUMMARY OFFENCES



of this right, and to inquire whether he desires to claim it before the charge is gone into (l)

**1228** If the accused is a child, the justices must ascertain whether his parent or guardian is present, and if so whether he desires to claim the right on behalf of the accused (m) The attendance of the parent or guardian may be required for this purpose (n) but if he does not attend the justices are entitled to deal with the case summarily (o)

**1229** After the accused has claimed his right to be tried by a jury the proceedings before the justices are in all respects the same as if the accused were charged with an indictable offence (p) and this applies to the provision of the costs of the proceedings (q)

**SECT 4**  
**Right of**  
**Accused to**  
**Trial by**  
**Jury**

Where  
accused is a  
child

Procedure  
after claim

## Part VIII—Procedure under Summary Jurisdiction

### SECT 1—*In General*

**1230** The judicial powers of justices sitting in petty sessions or as a court of summary jurisdiction are the creation of statute (r) The Acts of Parliament which confer the powers are very numerous and deal with a great variety of subjects with the result that there are peculiarities of procedure incidental to some of them but the mode in which the powers conferred by them are exercised and the procedure generally governing their exercise are prescribed by the Summary Jurisdiction Acts (a)

Nature of  
judicial  
powers

### SECT 2—*Information and Complaint*

**1231** Proceedings before justices sitting in petty sessions or as a court of summary jurisdiction are begun by an information or complaint (b) The distinction in summary jurisdiction procedure

Distinction  
between  
information  
and com-  
plaint

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 17 (2) If however the fact of a previous conviction which would render the defendant liable to more than three months imprisonment for the offence charged is made known to the justices at any time before sentence they may not deal with the matter as a first offence but must give him the option of trial by jury (*R v Beesby* [1909] 1 K B 849) but see *R v Fowler* (1895) 64 L J (M C) 9 and compare *Baile v Arnold* [1911] 2 K B 120

(m) *Ibid* s 17 (3)

(n) Children Act 1908 (8 Edw 7 c 67) s 98 and see title INFANTS AND CHILDREN Vol XVII pp 166 167

(o) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 17 (3)

(p) *Ibid* s 17 (1)

(q) Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) s 9 (1) see title CRIMINAL LAW AND PROCEDURE Vol IX pp 445 *et seq*

(r) *Kitchin v Shaw* (1837) 6 Ad & El 729 compare *Cullen v Trumble* (1872) L R 7 Q B 416 *Johnson v Colman* (1875) L R 10 Q B 544 As to the distinction between petty sessions and courts of summary jurisdiction see p 565 *ante*

(a) These Acts are defined as meaning the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) and the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) and any Act past or future amending those Acts or either of them (Interpretation Act, 1889 (52 & 53 Vict c 63) s 13 (7), (10))

(b) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43), s 1 That



**SECT 2**  
**Information**  
**and Com**  
**plaint**

between an information and a complaint is that an information is laid where the person charged has committed, or is alleged to have committed, an offence for which he is liable by law upon a summary conviction to be imprisoned or fined or otherwise punished while a complaint is made where the person in regard to whom it is made is liable or alleged to be liable to have an order made upon him either to pay money or to do an act which he has refused or neglected to do contrary to law (c)

**Information**

**1232** An information need not be laid upon oath (d) nor even in writing unless the statute under which it is laid so requires (e) It is however customary and advisable for an information to be in writing (f) and where it is desired that the justices should issue a warrant the information must be laid upon oath or affirmation (g)

**Complaint**

A complaint need not be made on oath (h) nor in writing (i) but if the summons is issued by the justices upon it is disobeyed the matter of complaint must be substantiated upon oath before a warrant will be issued (j)

**By whom**

**1233** In the great majority of cases any person (l) whether interested or not may act as informant or complainant but the right to do so is reserved in some instances by statute to an aggrieved person (l)

which marks the beginning or institution of proceedings is not the issue of a summons or warrant but the laying or making of an information or complaint (*Brooks v Bagshaw* [1904] 2 K B 198)

(c) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1 compare *Re Dillon* (1859) 11 I C I R 232 *per* HALL J at p 238 The determination of an information involves the conviction or acquittal of the person charged. The determination of a complaint involves an order of the justices upon the defendant or an order dismissing the complaint compare the forms given in the schedule to the Summary Jurisdiction Rules 1886 (Stat R & O Rev Vol XI Summary Proceedings England pp 1 *et seq*)

(d) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 10

(e) *I v Mullan* (1853) 22 L J (M C) 108 C C R see *Jastin v Carew* (1825) 3 B & C 649

(f) Although the Summary Jurisdiction Acts do not expressly require writing the provisions with regard to variance (see p 592 *post*) appear to contemplate it and justices not uncommonly require it. In the case of a summons (see p 593 *post*) applied for by the police justices often require an information in writing unless it is laid by the constable who applies for the summons

(g) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 10

(h) *Ibid* s 10

(i) *Ibid* s 8

(j) *Ibid* s 2

(l) The information should as a rule be laid by the party applying for the summons as to the summons see p 593 *post*

(l) Thus informations charging common assault must be laid by or on behalf of the party aggrieved (Offences against the Person Act 1861 (24 & 25 Vict c 100) s 42) Proceedings for the recovery of penalties under the Public Health Act 1875 (38 & 39 Vict c 55) can only be begun by a party aggrieved or the local authority concerned unless the consent in writing of the Attorney General is first obtained see *Dodd v Pearson* [1911] 2 K B 383. Proceedings against the owner or agent of a mine can only be begun by an inspector of mines except with the consent of a Secretary of State and see *Re Bates* [1911] 1 K B 964. Proceedings under the Dangerous Performances Acts 1879 and 1897 (42 & 43 Vict c 34 60 & 61 Vict c 52), and the Sunday Observance Act 1877 (29 Car 2 c 7) Sunday Observance Prosecution Act 1871 (34 & 35 Vict c 87) require

and a corporation cannot, unless authorised by the terms of the statute act as a common informer (*m*)

The information or complaint may be laid or made by the informant or complainant in person, or by his counsel or solicitor or other person authorised in that behalf (*n*)

SECT 2  
Information  
and Com  
plaint

**1234** Except in those instances in which a special limit of time is prescribed by the statute under which the proceedings are taken the time within which an information must be laid or a complaint made is six months from the time when the subject matter of the proceedings arose (*o*)

Limitation of  
time

the consent of the chief of police or in the latter case that of two justices

(*m*) *St Leonard's Shore-ditch Guardians v Franklin* (1878) 3 C P D 377 see title CORPORATIONS Vol VIII p 377

(*n*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 45) s 10

(*o*) *Ibid* s 11. The limitation does not however apply to continuing offences *Higgins v Northwich Union Guardians* (1870) 22 L J 752 (smoke nuisance) *Ulverstone Union Guardians v Fair* (1889) 3 J L 629 (liability for maintenance of bastard children) *R v Catholic Life and Fire Assurance and Annuity Institution* (1883) 48 L T 675 (failure on part of a company to make statutory returns) *Chepstow Electric Light and Power Co v Chepstow Gas and Coal Consumers Co* [1901] 1 K B 198 (compensation under private Act). The limitation does however apply in such cases as the following—*h v Portsmouth Justices* [1892] 1 Q B 491 (vaccination order) *Morant v Taylor* (1876) 1 L R D 168 (order for demolition of a building under a private Act) *Hull v London County Council* [1901] 1 K B 580 (projection on building contrary to the London Building Acts) Under the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict c 39) the limitation has been held to apply in cases where cruelty is charged (*Filis v Filis* [1896] P 251) but not where the charge is desertion (*Heard v Heard* [1896] P 188). The time of limitation also applies to proceedings for the recovery of civil debts see e.g. *Wachie v Fox* (1911) 75 J P 470. It begins to run from the time of the offence or in the case of a complaint from the time when the cause of complaint is complete (*Corbett v Badger* [1901] 2 K B 278 see *Labalmondrie v Addison* (1858) 1 L & E 41 *Mayer v Harding* (1867) 17 L J 140). Where the cause of complaint is non-payment of money due and the cause of complaint is complete a fresh demand will not revive the right to take proceedings (*Harpin v Syles* (1885) 49 J L 148). In the case of an offence the day on which it is committed is excluded in computing the time limit (*Jadchiff v Bartholomew* [1892] 1 Q B 161) and see title TIME. Proceedings under the Adulteration of Seeds Act 1869 (32 & 33 Vict c 112) must be begun in twenty one days (*ibid* s 7) under the Cruelty to Animals Act 1849 (12 & 13 Vict c 99) within one month (*ibid* s 14) under the Sale of Food and Drugs Act Amendment Act 1879 (42 & 43 Vict c 30) within twenty eight days in the case of perishable articles (*ibid* s 10) under the Bread Act 1836 (6 & 7 Will 4 c 37) within forty eight hours or longer as the justices may think fit (*ibid* s 31) under the Game Act 1831 (1 & 2 Will 4 c 32) within three months (*ibid* s 41) under the Merchandise Marks Act 1897 (50 & 51 Vict c 28) within three years after commission of the offence or one year of its discovery by the prosecutor (*ibid* s 15) under the Special Constables Act 1831 (1 & 2 Will 4 c 41) s 15 and the County Police Act 1839 (2 & 3 Vict c 93) for assaults on county or special constables or neglect of duty by such constable within two months under the Vaccination Acts 1867 (30 & 31 Vict c 84) and 1871 (34 & 35 Vict c 98) within twelve months (*ibid* s 11) under the Factory and Workshop Act 1901 (1 Edw 7, c 22) within three months of an offence coming to the knowledge of an inspector or two months after an inquest held in relation to it but in any case within six months (Factory and Workshop Act 1901 (1 Edw 7, c 22) s 146). In disputes between employers

**SECT 2**  
**Information**  
**and Com**  
**plaint**

Contents  
(1) as to  
offences or  
grounds of  
complaint

(11) as to  
persons  
charged  
Variation  
between  
terms of  
information  
and evidence

**1235** It must not include more than one offence or matter of complaint (p), but should it do so the defect, although one of substance, is not a fatal objection (q). The justices in such a case cannot refuse to hear the matter but they should either limit the prosecutor to proceeding on one offence or ground of complaint (r) or after hearing the evidence should determine which offence or ground of complaint is disclosed (s).

An information charging the commission of the same offence several times on the same occasion (t) and even on a series of occasions (u) is not defective but it will not support more than one conviction (a).

Two or more persons may be charged in the same information but it is in the discretion of the justices to hear the cases separately (b).

**1236** Provided that proceedings are begun within the required time variations between the terms of an information and the evidence given in support of it are not material (c). Where there is such variation the justices before whom the matter is heard may cause the information to be amended (d) and if they are of opinion

and workmen proceedings need not be begun within six months (*Charles v Plymouth Works (Mortgagees)* (1890) 60 L J (M C) 20). Where a statute simply provides that the penalties must be recovered within a certain time the words of the provision must be complied with (*E v Mannuaring* (1858) 27 L J (M C) 278) but where in addition the statute prescribes observance of the procedure of the Summary Jurisdiction Act it is sufficient if proceedings are begun within six months (*Morris v Duncan* [1899] 1 Q B 4) and see also as to friendly societies *Mackie v Lox* (1911) 75 J P 470 (A).

(p) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 10 see *R v Cradland* (1857) 7 E & B 853. An uncertainty sometimes exists whether a particular section of a statute creates one offence or two but it is submitted that a test may generally be found in the answer to the question whether evidence can be given of distinct acts committed by the person charged constituting two or more offences compare *Milnes v Bale* *Milnes v Lea* (1875) L R 10 C P 591 per BREIT J at p 594. Where the offence is charged in the alternative it is clear that two offences are included as where a tramway company was charged with the emission of smoke so as to constitute a ground of complaint to the passengers or the public (*Cotterill v Lempriere* (1890) 24 Q B D 634 see also *R v Slater Ex parte Bowler* (1903) 67 J P 299 *R v Wells* (1904) 68 J P 392). But where the information charged the emission of smoke and steam it was held that only one offence was committed (*Davis v Loach* (1886) 51 J P 118 see *Smith v Perry* [1906] 1 K B 120).

(q) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1

(r) *Rodgers v Richards* [1892] 1 Q B 555

(s) *Johnson v Needham* [1909] 2 K B 626. They may call upon the informant to elect which offence he alleges to have been committed (*ibid*).

(t) *R v Scott* (1863) 4 B & S 368 see further hereon 63 J I 546.

(u) *Onley v Gee* (1861) 30 L J (M C) 222.

(a) *R v Rawson* [1909] 2 K B 748.

(b) *R v Cradland* (1857) 7 F & B 853 *R v Fittlechild* (1871) L R 6 Q B 293.

(c) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 9. Similar provision is not made in the case of complaints which unlike informations are not commonly set out in writing.

(d) Thus where in a dispute between employer and workman the employer is wrongly described (*Whittle v Frankland* (1862) 2 B & S 49) or where ownership of property is incorrectly stated (*Bulph v Hurrell* (1875) 32 L T 846) or the date of an offence wrongly given (*Exeter*

that the defendant has been misled or deceived, they may adjourn the hearing to a future day and at their discretion grant or refuse bail to the defendant (e) but where the variation is such that a different offence is disclosed from that charged (f) or that the wrong person has been charged (g) the case must be dismissed

SECT 2 \*  
Information  
and Com  
plaint

**1237** It is sufficient to describe any offence in the words of the statute or any order by law regulation or other document creating it (h) and in such description any exception exemption, proviso excuse, or qualification contained in the provision creating the offence need not be specified or negatived (i) Where the offence is created by statute the information should conclude with the words against the form of the statute, otherwise it should conclude with the words 'against the peace etc (h) If the information charges a person with the commission of an offence for which he has a right to claim to be tried by a jury, the fact that he has already been convicted should be stated in the information (l)

Description of  
offence.

### SECT 3—*Summons or Warrant*

#### SUB SECT 1—*Summons*

**1238** When an information or complaint is laid or made before them, justices have a discretion in granting or withholding process (m) but the discretion must be deliberately exercised (n) otherwise in the event of the matter being one within their jurisdiction they will be compelled by rule to hear and determine it (o)

Discretion of  
justices to  
grant process

If they decide to grant process on an information they have a further discretion as to whether they will issue a summons or a warrant (p) but it is not usual or advisable to issue a warrant in

(*Corporation v Heaman* (1877) 37 L T 534) the information should be amended not dismissed It is expressly provided that in informations or complaints or the proceedings thereon partners joint tenants parceners or tenants in common and the property belonging to them as such are sufficiently described by naming one of them The works or buildings maintained etc at the expense of a locality or the materials for repairing them may be described as the property of the inhabitants of that locality goods provided for the service of the poor law as the property of the overseers of the poor of the locality or the guardians of the poor of the union concerned materials etc for the repair of highways as the property of the surveyor and the property of commissioners of sewers of any district as such in each case without naming the persons (Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 4)

(e) *Ibid* s 9

(f) *Martin v Pridgeon* (1859) 1 E & E 778 *Loadman v Cragg* (1862) 26 J P 743 *R v Brichall* (1864) 33 L J (M C) 116

(g) *Orford (City) Turnpike Co v Sankey* (1890) 54 J P 564

(h) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 39 (1)

(i) *Ibid* s 39 (2)

(l) *R v Wise* (1844) 3 I T (O S) 410 Omission of the words is not however a fatal objection (Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1)

(m) See Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 17 but see *R v Beesby* [1909] 1 K B 849 and p 588 ante

(n) *R v Kennedy* (1902) 86 L T 753 and see cases cited at p 657, post

(o) *R v Adamson* (1875) 1 Q B D 201 see p 657 post

(p) *R v Adamson supra*

(p) Summary Jurisdiction Act, 1848 (11 & 12 Vict c 43) s 2

SECT 3 the first instance except in cases where a summons may be expected  
 Summons or to be disobeyed (q)

### Warrant

Form and  
 contents

**1239** The summons must contain a short statement of the matter of the information or complaint and must require the person to whom it is addressed to appear at a time and place named in it before the justice issuing the warrant or such other justices having the same jurisdiction as may be present at such time and place (r) It must be signed by one of the justices who received the information or complaint (s)

Defects or  
 variations

**1240'** Defects in the summons or warrant or variation between the facts alleged in either of them and the evidence is given are not objections fatal to the hearing of the case but where the justices are of opinion that the defendant may have been deceived or misled they may in their discretion adjourn the hearing upon such terms as they think fit and grant or refuse bail to the defendant (t) Any irregularity in the form or service of the summons or the form or execution of the warrant is cured by the appearance of the party summoned or arrested (a) but this does not apply in the case of a defendant who appears purely for the purpose of filing objection to such an irregularity (b)

Effect of  
 appearance

Service

**1241** The summons is served by the person to whom it is delivered upon the party to whom it is addressed either personally or by leaving it with someone for him at his last or most usual place of abode (c) and the person serving it must attend at the time

(q) *R v Stafford (Borough) Justices* (1830) 5 Nev & M (κ B) 94  
*O'Brien v Brabner* (1880) 49 J P 227

(r) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1 The usual practice is to make the summons returnable on a day when a court of petty sessions is regularly held

(s) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 29 see p 390 ante *Dixon v Wells* (1890) 20 Q B D 249 A form of summons is supplied in the schedule to the Summary Jurisdiction Rules 1886 (Stat k C O Pev Vol XI Summary Proceedings England pp 1etseq) see r 301 It provides for a seal but the absence of a seal even if a defect is not a fatal objection to the proceedings (*K v Carlett Pegge Ex parte Brown* [1911] 1 K B 880)

(t) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) ss 1 9

(a) *R v Berry* (1809) 28 L J (M C) 86 C C R *Egginton v Pearl* (1815) 33 L T 428 *R v Hughes* (1819) 4 Q B D 614 C C R *Gray v Customs Commissioners* (1884) 48 J P 343

(b) *Dixon v Wells* (1890) 25 Q B D 249 *Pearks Cunston and Ter Ltd v Richardson* [1902] 1 K B 91

(c) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1 The person to whom the summons is delivered is usually a constable or police officer The mode of service here prescribed is sufficient in all cases except under statutes passed since the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) in which some other mode of service is prescribed or in which the procedure of the Summary Jurisdiction Act is excluded when in default of a mode of service being prescribed the service must be personal (see Stone's Justices Manual 43rd ed 929) The defendant's last place of abode means his then present place of abode if he has any or his last if he has ceased to have any (*R v Evans and Yale* (1850) 19 J J (M C) 151 per COLERIDGE J at p 154) The last abode of a defendant who has ceased to reside in England but has a place of abode abroad is that in the foreign country (*I v Farmer* [1892] 1 Q B 637 C A) But where a defendant has ceased to reside in England and there is no

and place named in the summons to give evidence of service if required (*d*). If the summons has not been served the justices may in their discretion issue a second summons (*e*) but if it has been served and disobeyed then upon proof that it was served a reasonable time before the time appointed for the defendant to appear, they may cause the matter of the information or complaint to be substantiated on oath and issue their warrant (*f*) for the arrest of the defendant (*g*) or proceed to hear and determine the matter of the information or complaint *ex parte* to all intents and purposes as if the defendant had appeared (*h*).

SECT 3  
Summons or  
Warrant  
—  
Service and  
non  
appearance

**1242** No provision exists for the withdrawal of a summons but in practice it is not infrequently withdrawn the effect being to put an end to the complaint upon which it is founded (*i*).

Withdrawal  
of summons

evidence that he has acquired a fixed place of abode in a foreign country service at his last place of abode in England is good (*R v Webb* [1896] 1 Q B 487 see also *Delombie v Touquault* (1909) 44 L J 263. It has been held under an old statute now repealed that where the summons is left with someone for the defendant it is sufficient to leave a copy of the summons if the original is shown to him (*P v Chandler* (1811) 14 List 261) but the nature of the summons must be explained to the person with whom it is left (*R v Smith* (1875) 1 R 10 Q B 604) and service upon a person living in the building in which there is a shop belonging to the defendant but in which the defendant does not himself reside is insufficient (*K v Lilley Ex parte Taylor* (1910) 75 J 1 9). See examples of prescribed modes of service see titles BASTARDY Vol II p 446 COMPANIES Vol V p 83 FOOD AND DRUGS Vol XV pp 30 31 FRIENDLY SOCIETIES Vol XV p 191. Other special modes of service are prescribed by the Army Act 1881 (44 & 45 Vict c 58) s 14 (3) Employers and Workmen Act 1875 (38 & 39 Vict c 90) s 9 and the Employers and Workmen Rules 1886 (Stat R & O Rev Vol VI Summary Proceedings England p 35) r 2 Distress for Rates Act 1849 (12 & 13 Vict c 14) s 5 Poor Law Amendment Act 1868 (31 & 32 Vict c 122) ss 39 40. As to service under the Public Health (London) Act 1891 (54 & 55 Vict c 76) and the London Building Act 1894 (57 & 58 Vict c cxxiii) see *R v Mead* [1894] 2 Q B 124 and *K v Mead* [1898] 1 Q B 110.

(*d*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1 and see as to proof of service by declaration the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 41).

(*e*) See *Ex parte Fielding* (1861) 25 J P 759.

(*f*) As to execution of warrants see title CRIMINAL LAW AND PROCEDURE Vol IX pp 290 *et seq* as to backing of warrants see *ibid* and p 564 *ante*. The provisions of the Indictable Offences Act 1845 (11 & 12 Vict c 42) relating to the execution and backing of warrants are incorporated into the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) see *ibid* s 3.

(*g*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) ss 2 13. But *quære* if there is evidence that the defendant could not have received notice of the summons. If in answer to a summons the defendant has appeared by counsel there is no obligation on him to appear personally and the justices have no jurisdiction to issue a warrant on the ground that he should have appeared himself (*R v Thompson* [1909] 2 K B 614) *R v Montgomery Ex parte Long* (1910) 74 J P 110.

(*h*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) ss 2 13. The provision as to reasonable time should be observed by justices in order to give the defendant an opportunity of being heard (compare *R v Stafford (Borough) Justices* (1835) 5 Nev & M (K B) 94) but the justices are themselves the judges of what is a reasonable time (*Re Williams* (1851) 21 L J (M C) 46 *R v Smith* (1875) 1 R 10 Q B 604 *R v Cambridgeshire Justices* (1880) 44 J P 168).

(*i*) *Pickavance v Pickavance* [1901] P 60.

## SECT 3

## SUB SECT 2 — Warrant

**Summons or Warrant**

Issue upon oath

Power to withdraw warrant

**1243** The justices may also, if the matter of the information or complaint is substantiated upon oath, issue a warrant authorising the police to arrest the accused and bring him before the court to answer the charge (*j*)

**1244** Where a warrant has been issued by a justice in the exercise of his judicial discretion he appears to have power to withdraw it at any time before its execution and to be liable to be compelled to do so where it is clear that the person against whom it is issued has committed no offence (*k*) but it would appear to be otherwise where the issue of a warrant is a purely ministerial act (*l*)

## SECT 4 — The Hearing

Non appearance of informant or complainant

**1245** If the informant or complainant does not appear upon the day named the case will in the ordinary course be dismissed (*m*) but the justices have power in their discretion to adjourn the hearing to some other day upon such terms as they think fit and in such case they may in their discretion grant or refuse bail to the defendant (*n*)

Both parties present

**1246** If both parties are present the justices must proceed forthwith subject to their powers of adjournment to hear and determine the case (*o*)

Appearance by counsel

**1247** Both the informant or complainant and the defendant may appear in person or by their counsel or solicitor (*p*)

(*j*) As to the issue and indorsement of warrants see p 564 *ante*. In certain cases the accused may be arrested without warrant for a recent example see the Protection of Animals Act 1911 (1 & 2 Geo 5 c 27) s 12 (1) (this Act comes into force on 1st January 1912) see further title CRIMINAL LAW AND PROCEDURE Vol IX pp 296 *et seq* and for an example of a case where in a great emergency a superintendent of police may by written order give a constable an authority similar to a justice's warrant see the Official Secrets Act 1911 (1 & 2 Geo 5 c 28) s 9

(*l*) *R v Croseman Ex parte Chetwynd* (1908) 98 L T 760 see *Stone's Justices Manual* (1911) 930

(*l*) *Barons v Luscombe* (1835) 3 Ad & El 589

(*m*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 13

(*n*) *Ibid*. But the absence of the informant will not invalidate the decision of the justices if the defendant desires the hearing to proceed (*May v Beeley* [1910] 2 K B 722)

(*o*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 13 As to the power to adjourn see p 599 *post*

(*p*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 12 see *R v Thomson* [1909] 2 K B 614 and note (*g*) p 595 *ante*. Where a solicitor is employed he must be admitted and enrolled and otherwise duly qualified to act within the meaning of the Solicitors Act 1843 (6 & 7 Vict c 73) see *ibid* s 3 and title SOLICITORS. A solicitor if not authorised by the defendant cannot bind the defendant by pleading guilty on his behalf even where the defendant is an infant and he is authorised by the defendant's father (*R v Aves R v Same* (1871) 24 L T 64). The following officials are specially authorised by statute to conduct certain proceedings before justices — a factory inspector with the written consent of a Secretary of State in matters arising under the Factory Acts or in the course of his duty as inspector (Factory and Workshop Act 1901 (1 Edw 7 c 22) s 120 see title FACTORIES AND SHOPS Vol XIV, p 530) an officer or person employed or authorised by the Commissioners or Solicitor of Inland Revenue in revenue matters (Inland Revenue Regulation Act 1800 (53 & 54 Vict c 21) s 27 see title REVENUE), a clerk or other officer of a board of guardians on

**1248** In the ordinary course the hearing will take place on the day named in the summons or upon a day named by the justices, after the defendant is arrested on their warrant notice of which day must be given to the informant or complainant (*q*)

SECT 4.

The  
Hearing

Time and  
place of  
hearing

It must take place in open court (*r*) before one or more justices, as the circumstances may require (*s*)

Procedure

**1249** The first step at the hearing is to state to the defendant the substance of the information or complaint and ask him if he has any cause to show why he should not be convicted or have an order made against him (*t*)

**1250** The defendant is entitled to prove that he is protected by some exemption exception proviso or condition in the statute on which the information or complaint is framed (*a*) or to set up a claim of right in any case where an interest in real property is involved (*b*)

Matters of  
defence  
Statutory  
exemption

**1251** A claim of right if established ousts the jurisdiction of justices altogether (*c*) If the claim is made *bona fide* it is not for the justices to inquire into all the circumstances to see if it is impossible (*d*), and if upon the consideration of admitted facts it is clear that the law will not admit of the claim their jurisdiction is not ousted (*e*) but if in order to decide whether a legal claim exists it is necessary to determine some disputed question of fact or if it is not clear that the right claimed is impossible in law, their jurisdiction is ousted (*f*)

Claim of  
right

behalf of the board (Poor Law Amendment Act 1844 (7 & 8 Vict c 101) s 68 see title POOR LAW) the clerk to any local authority for any local authority under the Public Health Act 1875 (38 & 39 Vict c 55) s 259 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) the clerk to a local education authority or a person appointed to carry out the compulsory bye laws of a school on behalf of a local education authority (Elementary Education Act 1870 (33 & 34 Vict c 75) s 85 Elementary Education Act 1876 (39 & 40 Vict c 79) s 38) In proceedings under the Elementary Education Acts generally any person may appear by any member of his family or any other person authorised by him in that behalf see title EDUCATION Vol XII p 65 An informant or complainant whether a public officer or a private person has a right to examine and cross examine witnesses although he is not a barrister or solicitor (*Duncan v Toms* (1887) 56 L J (M C) 81) but it is not desirable that a police officer should conduct a case (*Webb v Catchlove* (1886) 50 J P 795) and see *Duncan v Toms supra* and titles POLICE SOLICITORS

(*q*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 13

(*r*) *Ibid* s 12 Open court means a petty sessional court house or an occasional court house (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (2)) see pp 565 568 *ante*

(*s*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 12 see p 573 *ante* and p 600 *post*

(*t*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14

(*u*) *Ibid* *Dunning v Trainer* (1909) 73 J P 400

(*v*) *R v Oridland* (1857) 7 L & B 853 and see cases cited below

(*w*) As to the essentials of such a claim see titles FISHERIES Vol XIV, p 640 GAME Vol XV p 231 TRESPASS

(*x*) *Scott v Baring* (1895) 64 L J (M C) 200 see also *Croydon Rural District v Cowley* (1909) 73 J P 205

(*y*) *Arnold v Morgan* [1911] 2 K B 314, 322

(*z*) *Ibid* see also *Hudson v MacRae* (1863) 4 B & S 585, and, further, cases cited in title GAME, Vol XV, p 231



## SECT 4

**The  
Hearing**

Plea of  
*autrefois*  
*convict* or  
*autrefois*  
*acquitt*

Judgment  
when no  
defence  
shown

Hearing the  
parties and  
the evidence

Witnesses

**1252** The defendant may also plead *autrefois convict* (g) or *autrefois acquit* (h) if the same act of his has already been the subject of proceedings (i) but if on the previous occasion the information or complaint was dismissed merely upon a point of form and not adjudicated upon the plea will not avail (h)

The plea of *autrefois acquit* cannot be set up in addition to a plea of not guilty (l)

**1253** If the defendant can show no cause or no sufficient cause the justices will forthwith give judgment against him accordingly (a) but if he disputes the truth of the facts alleged against him the justices will proceed to hear the case (b)

**1254** The justices will hear the informant or complainant and his witnesses and then the defendant and his witnesses after which they will hear any evidence brought by the informant or complainant in reply if the defendant has examined any witnesses or given any evidence on any point other than his general character (c) They have the same power as a judge of the High Court to call or examine witnesses themselves or to allow or disallow questions put to a witness by or on behalf of the parties (d)

**1255** All witnesses must be examined upon oath or affirmation which the justices have full power to administer (e) The attendance of a reluctant witness may be secured by compulsory means (f) and

(g) See title CRIMINAL LAW AND PROCEDURE Vol IX p 336 A conviction for offences punishable summarily is a bar to proceedings upon indictment on the same facts (*R v Waller* (1843) 2 Mood & R 446 *A v Miles* (1890) 24 Q B D 423 (C R)) but if after a summary conviction the act of the defendant results in further consequences calling for a more serious charge the summary conviction is no bar to such a charge being brought (*A v Morris* (1867) 1 R 1 C C R 90 *A v Friel* (1890) 17 Cox C C 25)

(h) See title CRIMINAL LAW AND PROCEDURE Vol IX p 336 *R v Ilrington* (1861) 1 B & S 688 If an information is dismissed by justices who are equally divided the dismissal is a bar to a fresh information on the same facts (*Kinnis v Graves* (1898) 67 L J (Q B) 583) As to the certificate of dismissal see p 601 post

(i) The test is whether the same evidence would be required on both occasions If fresh evidence is adduced and the charge is different there is no bar (*Bollard v Spring* (1887) 51 J P 501) and see title LSTOIRPLE Vol XIII pp 356 357 In bastardy matters which are outside the operations of the Summary Jurisdiction Acts a further summons on the same facts may be granted see title BASTARDY Vol II p 445

(k) *R v Ridgway* (1822) 5 B & Ald 527 *R v Harrington* (1864) 28 J P 485 So too where an information was laid by a person not entitled to lay it and dismissed it was held no bar to an information subsequently laid by a qualified person (*Foster v Hull* (1869) 20 L T 482)

(l) *R v Banks* (1911) 271 L R 575 C C A see further hereon *R v Norton (Stephen)* (1910) 45 L J 581

(a) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14

(b) *Ibid*

(c) *Ibid* but they need not hear evidence which in their discretion they regard as immaterial (*A v Knight* (1897) 41 Sol Jo 276)

(d) Compare *Coulson v Disborough*, [1894] 2 Q B 316 C A and see Stone's Justices Manual 1911 p 932 title EVIDENCE Vol XIII p 599

(e) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 15 As to the power of a justice to direct a prosecution for perjury see Perjury Act 1911 (1 & 2 Geo 5 c 6) s 9 (1) (this Act comes into force on 1st January 1912)

(f) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 7 A

the refusal without just excuse of a witness to answer questions relevant to the issue renders him liable to imprisonment on the issue of a warrant by a justice who is present (g)

SECT 4  
The  
Hearing

**1256** After hearing the evidence upon both sides and considering the whole matter the justices will proceed to determine it and either convict the defendant or make an order upon him or else dismiss the information or complaint (h)

Determi-  
nation of  
matter

**1257** In some cases where in the interests of the public immediate action is required (i) power is given to justices to proceed *ex parte* without issuing either a summons or warrant (j) and no proceedings against a man personally even in such cases can be initiated without the issue of a summons or warrant (l)

*Ex parte*  
proceedings

witness attendance may be secured by the issue of a summons and of a warrant if the summons is disobeyed or by the issue of a warrant in the first instance (Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 7) If the witness is out of the jurisdiction the means of compelling his attendance (see title CRIMINAL LAW AND PROCEDURE Vol IX p 314 note (m)) prescribed by the Indictable Offences Act 1848 (11 & 12 Vict c 43) may be adopted (Summary Jurisdiction Act 1848 (42 & 43 Vict c 49) s 36) If the witness required is in Scotland his attendance may be secured in the same manner (Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict c 24) s 4) A warrant will only be issued in the first instance upon sworn evidence that the witness is unlikely to attend without compulsion It will be issued if a summons is disobeyed upon proof that the summons was duly served (see p 595 *ante*) and that a reasonable sum was paid or tendered to him for his costs and expenses There is some doubt whether the powers given extend to securing the attendance of an unwilling informant or complainant (see Stone's Justices Manual 1911 pp 40 *et seq*) There is no power given to compel a witness to produce documents etc and if these are required a Crown office *subpoena duces tecum* must be issued (see title EVIDENCE Vol XIII pp 579 *et seq*) but a justice has power under the Bankers Books Evidence Act 1879 (42 & 43 Vict c 11) ss 7-10 to make an order for either of the parties before him to inspect and take copies of entries in bankers books (*R v Volghorn* [1908] 2 K B 949 and see title BANKERS AND BANKING Vol I pp 644 *et seq*) Powers to compel the attendance of witnesses are given to metropolitan police magistrates by the Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 22 There is no power to enable justices to take the evidence of a witness who is prevented by illness from attending the court (*Ex parte Kimbolton (Inhabitants)* (1861) 25 J P 753) and the provision of the Criminal Law Amendment Act 1867 (30 & 31 Vict c 35) with regard to the taking of dying declarations applies only in the case of indictable offences As to the duty of a magistrate under the Indictable Offences Act 1848 (11 & 12 Vict c 42) s 17 to attend at the residence of and to take depositions of a witness who is seriously ill and unable to attend the hearing see *R v Bros Ex parte Hardy* [1911] 1 K P 159 As to dying declarations see title CRIMINAL LAW AND PROCEDURE Vol IX pp 593 *et seq*

(g) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 7 The justice must be one having jurisdiction at the place of hearing and the period of imprisonment must not exceed seven days (*ibid*) see *L v Flaxell* (1884) 14 Q B D 364 A witness is not bound to answer questions which are reasonably likely to incriminate him see title EVIDENCE Vol XIII pp 574 *et seq*

(h) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14

(i) *Gill v Bright* (1871) 41 L J (M C) 22 *Ex parte Francis* [1903] 1 K B 275 compare *R v Cheshire Lunatics Committee* (1873) 1 R 8 Q B 344

(k) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 1 see the Public Health Act 1875 (38 & 39 Vict c 55) ss 116-117 *White v Redfern* (1879) 5 Q B D 15 *Thomas v Van Os*, [1900] 2 Q B 448

(l) *Ways v Thompson* (1885) 15 Q B D 342

## SECT 4

**The  
Hearing**

Adjournment  
Time and  
place to be  
stated

**1258** The justices or a justice have power to adjourn the hearing of a case whether before the hearing is begun or at any time after it has been begun and before it is finally determined (*m*). The adjournment may be for any length of time but should it be for such an unreasonable period as would in effect amount to the justices declining jurisdiction the High Court will interfere so as to get the matter determined (*n*). The time and place at which the hearing is to be resumed must be stated in the presence and hearing of the parties or the persons representing them (*o*).

Bail

The justices may in their discretion permit the defendant to be at large, either with or without bail or order him to be kept in custody during the interval (*p*).

Non  
appearance  
after adjourn-  
ment

If either or both of the parties fails or fail to appear personally or by his or their representatives at the time and place appointed for the resumed hearing, the justices may proceed with the hearing in their absence (*q*) and if the informant or complainant is the party failing to appear the justices may dismiss the information or complaint with or without costs as they think fit (*r*).

Adjournment  
to petty  
sessions

If the court before which the defendant appears is not a petty sessional court the justice or justices present may adjourn the hearing to the next practicable sitting of a petty sessional court (*s*).

Same justices  
to act  
throughout

**1259** Where the matter is one requiring the presence of two or more justices two at least of the justices composing the court must have been present and acting together during the whole of the hearing and determination of the case (*a*).

The same principle applies where the matter is one which can be heard by one justice or where the court is composed of an alderman of the City of London or metropolitan police magistrate or other stipendiary (*b*).

But the justice who issued the warrant or summons need not be present at the hearing (*c*) and neither his death nor the fact that he has ceased to hold office invalidates the warrant or summons (*d*).

(*m*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 16 see also *ibid* ss 9 13 and p 596 *ante*

(*n*) *R v Southampton Justices Ex parte Lebern* (1907) 96 L T 697 The justices may exercise their discretion in granting a long adjournment when in their opinion it is in the interests of justice to do so (*ibid* *R v Smith* (1894) *Times* 29th January) compare *R v Monaghan Justices* (1911) 45 I L T 10 Even in cases in which the statute creating an offence gives no power of adjournment the powers given by the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) are available (*Gelen v Hall* (1867) 2 H & N 379) The defendant has no right to have the proceedings adjourned in order for him to obtain a solicitor or counsel to defend him (*R v Lipscombe Ex parte Buggins* (1862) 26 I P 244 *R v Cambridgeshire Justices* (1880) 44 J P 168) but justices will usually exercise their discretion in favour of such an adjournment

(*o*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 16

(*p*) *Ibid*

(*q*) *Ibid*

(*r*) *Ibid*

(*s*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 (11) see p 565 *ante*

(*a*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 29 This applies to every hearing not merely to an adjourned hearing

(*b*) Compare *Re Guerin* (1888) 58 L J (M C) 42

(*c*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 29

(*d*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 37

Where the justice or justices before whom the hearing is begun is or are unable to proceed with the hearing it is sufficient if the witnesses are resworn before the new court and the evidence already given by them is read over to them and assented to by them (e)

SECT 4  
The  
Hearing

**1260** The decision of the justices is determined by the votes of the majority the chairman having the same right to vote as the other justices present but having no casting vote (f) Where the justices are equally divided the case should be adjourned and reheard by a reconstituted court (g) They are entitled to take time or to adjourn before delivering their decision (h) which is not irrevocable at all events in the case of a conviction until the conviction is actually drawn up (a)

Decision of  
the justices,  
how  
determined

Where two informations are laid against the same defendant the justices may postpone the announcement of their decision on the first information until after they have heard the second but only on condition that they apply the evidence in each case to that case alone (b)

Postponement  
of decision

**1261** If the justices convict the defendant or make an order against him it is their duty to furnish a minute or memorandum thereof (c) and to draw up the conviction or order in proper form under their hand and seal (d)

Certificate of  
conviction

If they dismiss the information or complaint they may if they

Certificate of  
acquittal

(e) *Ex parte Bottomley* [1909] 2 K B 14 *Re Guerin* (1888) 58 L J (M C) 42 *R v Smith* (1817) 2 Stark 208 *R v Jeffreys* (1870) 22 L T 786 In *Ex parte Bottomley supra* a criminal inquiry for an indictable offence was held before an alderman of the City of London who fell ill during the proceedings and the inquiry was continued before another alderman. In the course there pursued was for some of the witnesses who had been called before the alderman who began the hearing to be recalled. This may be justified on the grounds that all that is required at such an inquiry is to satisfy the magistrate of the existence of a *prima facie* case on which he could commit the defendant for trial if he deemed fit and that no injustice is done to the defendant as he already has notice of all the evidence which will be called against him at the trial (compare *Re Guerin supra*) But where the matter is being dealt with summarily it is presumed that it will be necessary to recall and reswear all the witnesses

(f) *Stone's Justices Manual* 1911 p 947

(g) *Bagg v Colquhoun* [1904] 1 K B 554 see *R v Ashplant* (1888) 52 J P 474 *Ex parte Evans* [1894] A C 16 If however the justices do not adjourn the hearing the information or complaint must be dismissed (*R v Ashplant supra*) see also *Kinnis v Graves* (1898) 67 I J (Q B) 583

(h) See p 599 *ante*

(a) *Jones v Williams* (1877) 36 L T 559 *per* LINDLEY J at p 560 It is presumed however that if the justices announce that they have dismissed a case they cannot reverse their decision. Alteration if it takes place at all must take place before the end of the sitting of the court compare p 641 *post* As to the subsequent increase of a fine to justify a longer term of imprisonment in default of payment see *M Rory v Findlay* (1911) 48 Sc L R 314

• (b) *R v Fry Ex parte Master* (1898) 67 L J (Q B) 712 *Hamilton v Walker* [1892] 2 Q B 26

(c) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14 No fee is chargeable for this (*ibid*) The defendant must be served with a copy before a warrant of commitment or distress is issued against him (*ibid* s 17)

(d) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14. The conviction or order may be on paper or parchment (*ibid* s 17) and must be signed by two justices where it is required that two justices should hear the case but the signature of two is sufficient where more than two have heard the case (see Home Office circular of 25th June, 1896) If the

## SECT 4

The  
HearingFiling of  
certificate

think fit and are required to do so make an order of dismissal and furnish the defendant with a certificate thereof (c)

Certificates of conviction or dismissal must be transmitted to and filed by the clerk of the peace (f)

## SECT 5 — Judgment

Imprison-  
ment

**1262** In the event of the justices deciding against the defendant they have power to commit him to prison (g) in all cases in which the statute giving occasion for the information or complaint authorises imprisonment either in the first instance (h) or in default of his doing any act (i) or paying any sum of money (j), which the justices have ordered him to do or pay

Default of  
distress

The justices may also commit him to prison in all cases other than proceedings for the recovery of civil debts where a warrant of distress having been issued by them there is default of distress (l)

Fine in lieu of  
imprison-  
ment

**1263** In every case where imprisonment is prescribed by statute in the first instance they may in their discretion inflict a fine in lieu thereof (h) but the amount of such fine must not exceed £25 nor render the defendant liable in default of payment to a greater term of imprisonment than he would have been liable to by the statute under which he was convicted (m)

Reduction of  
prescribed  
punishment

They have also power in their discretion to reduce the term of imprisonment prescribed by statute in any case or to impose the same without hard labour if that is prescribed or to mitigate punishment in both these ways (n)

Consecutive  
terms of im-  
prisonment

**1264** Where a defendant whom the justices have convicted is already in prison they have power to make an order and embody it in the warrant of commitment addressed to the gaoler directing that the term of imprisonment which they impose shall commence at the expiration of the term which the defendant is then serving (o)

statute on which it was founded was passed since the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) and contains a form of conviction or order that form must be adopted otherwise the forms given in the schedule to the Summary Jurisdiction Rules 1886 (Stat 1 & 2 P.C. Vol XI Summary Proceedings England pp 1 *et seq*) should be employed

(e) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14 Although placed within the discretion of justices it appears from *ibid* s 18 that in all cases where costs are given an order of dismissal is required. The certificate is evidence without further proof of the dismissal and is a bar to other proceedings (*ibid* s 14 and see p 598 *ante*)

(f) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 21 (6)

(g) As to prisons generally see title PRISONS

(h) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 21

(i) *Ibid*

(j) *Ibid* s 23

(k) *Ibid* ss 21 22 see the Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 5 As to the scale of imprisonment see p 604 *post* and as to distress generally see title DISTRESS Vol XI pp 221 *et seq*

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 4

(m) *Ibid* As to scale of imprisonment see p 604 *post*

(n) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 4 But this power to mitigate punishment does not apply to any proceedings taken under any Act relating to the regular or auxiliary forces of the Crown (*ibid* s 52 and see title ROYAL FORCES)

(o) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 25

They also have power in the case of a defendant whom they have convicted at one time of several distinct offences to make an order directing that the terms of imprisonment imposed in regard to the respective offences shall run consecutively (*p*) but they may not inflict more than two sentences to run consecutively (*q*) and where the defendant is convicted of more than one assault committed on the same occasion the terms of imprisonment imposed by the justices must not in the aggregate exceed six months (*i*)

CLERK  
Judgment

Limit in cases  
of assault

**1265** Where the justices decide to impose a pecuniary penalty the sum adjudged must be paid at once unless they make a further order in regard to it. But they have power to direct payment to be made at such time or times in one sum or by instalments and in such place or places and to such person or persons as they may specify and to permit the person liable to pay the money to give security with or without sureties for its payment (*q*)

Fine  
Time and  
mode of  
payment

Where a specified sum is prescribed by statute as the penalty for an offence they may reduce the amount if imposed in respect of a first offence (*r*) but not otherwise (*u*)

Reduction of  
penalty

**1266** Justices have also power in their discretion to award to either party if successful such costs as seem to them just and reasonable (*a*). The amount so awarded should be specified in the conviction or order of dismissal and is recoverable from the

Award of  
costs on  
dismissal or  
conviction

(*p*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 25. *P v Cribbush* (1867) 1 R 2 Q B 379. Where two penalties are imposed one of a term of imprisonment and the other of a fine with imprisonment in default of payment the justices should direct the term of imprisonment in default of payment to commence at the end of the other punishment in order to afford time for collection of the money required to pay the fine (Home Office circular 21st February 1898)

(*q*) *R v Martin* [1911] 2 K B 450

(*i*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 18. This provision does not however apply to imprisonment in default of finding securities (*ibid*) see p 607, *post* see further hereon Home Office Circular 28th June 1911 131 I T Jo 225

(*s*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 7. If default is made in the payment of any instalment the same proceedings may be taken as if default had been made in payment of all the instalments remaining unpaid (*ibid*). The person to whom payment is ordered to be made if not the clerk to the justices must pay the amount over to the clerk to the justices as soon as may be and account for it to him (*ibid*)

(*t*) *Ibid* s 4. Where however by a statute passed since the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) it is provided that not less than a minimum sum shall be imposed for a first offence the justices have no power to reduce the penalty below that sum (*Osborn v Wood Brothers* [1897] 1 Q B 191) and where the statute prescribing the amount exists in order to carry into effect a treaty or convention with a foreign State in which there is a stipulation for a fine of a minimum amount they cannot reduce that amount (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 54)

(*u*) For this purpose the fact that the defendant's first conviction is not stated in the information or summons is immaterial if the fact is proved (*Murray v Thompson* (1888) 22 Q B D 142)

(*a*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 18. But in cases where the penalty imposed does not exceed 5s costs are not to be given against the defendant unless the justices so expressly order. The fees payable by an informant are to be remitted to him unless the justices expressly counter order the remission and the fine may be paid wholly or in part to him at the discretion of the justices (Summary Jurisdiction Act, 1879 (42 & 43 Vict c 49) s 8)

# SECT 5 Judgment.

defendant in the same manner as any penalty imposed by them is recoverable, and, where any such penalty is imposed, then by the same warrants and at the same time as the penalty itself (b) From the informant or complainant it is recoverable in the same manner as if the sum were a civil debt (c)

Amount ordered to be paid includes costs

**1267** The sum adjudged to be paid by a conviction or order includes the costs if the amount of the latter is ascertained by the conviction or order (d) and where the conviction or order does not impose a fine the costs if ascertained, may be recorded as a sum adjudged to be paid (e)

Enforcement of order by distress or imprisonment

**1268** If the payment is not made as directed justices have power to issue a warrant authorising distress of the defendant's goods (f) or a warrant committing him to prison (g) The term of imprisonment which may be inflicted in default of payment of the sum adjudged or of distress is limited by scale (h)

Term of imprisonment.

A person sentenced to imprisonment for default in payment is entitled to be discharged upon payment to the keeper of the prison (i) of the sum due and the costs and expenses mentioned in the commitment (h) and if he pays part of the sum due and costs he is entitled to remission of such part of the term of imprisonment as is proportionate to the part of the sum paid (l)

(b) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 18 see the text and notes *infra*

(c) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 18 26 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 47 see also *ibid* s 30 *R v London (Lord Mayor) Ex parte Boaler* [1893] 2 Q B 146 and see p 609 *post*

(d) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 49

(e) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 24

(f) *Ibid* s 19 As to procedure on distress warrants see title DISTRESS Vol XI pp 221 *et seq*

(g) This in effect gives the defendant the option of a fine or imprisonment The warrant may be issued either in default of distress or where the statute directs commitment in case of non payment or where imprisonment would be less injurious than distress (Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) ss 21—23 title DISTRESS Vol XI p 223)

(h) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 5 The scale is as follows —

| Amount adjudged to be paid         | Imprisonment.        |
|------------------------------------|----------------------|
| Not exceeding 10s                  | Not exceeding 7 days |
| Exceeding 10s but not exceeding £1 | 14                   |
| £1                                 | 1 month              |
| £5                                 | 2 months             |
| £20                                | 3                    |
| Exceeding £20                      |                      |

The imprisonment is to be without hard labour except where that is authorised by the statute under which the defendant is convicted and then only if the justices think fit and the term awarded does not exceed that authorised by the statute (*ibid*) In proceedings under Revenue Acts where the sum to be paid exceeds £50 the period of imprisonment in default may exceed three months but must not exceed six (*ibid* s 53)

(i) See title PRISONS

(k) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 28

(l) Summary Jurisdiction Act, 1879 (42 & 43 Vict c 49) s 21 (4) Prison Act 1898 (61 & 62 Vict c 41) s 9 The same result will follow by application of the proceeds of distress see title DISTRESS, Vol XI p 223 The person to whom the defendant makes the payment must pay over the amount to the clerk to the justices upon whose warrant the defendant is committed (Summary Jurisdiction Act, 1848 (11 & 12 Vict c 43), s 31);

## SECT 5

## Judgment

## Other orders

## Nominal penalties

**1269** If the justices find that the charge made against a defendant is proved, but that the circumstances of the case render it expedient to impose no penalty at all or merely a nominal one they need not proceed to a conviction, but may instead dismiss the charge or information or discharge the defendant conditionally on his giving security with or without sureties to be of good behaviour and to appear for conviction and sentence when called on at any time during a period not exceeding three years to be named in the order (m)

They may also in such circumstances make an order for the payment by the defendant of damages for injury or compensation for loss not exceeding £10 and of such costs as they deem reasonable (n)

Damages for injury or compensation for loss

and see further p 603 *ante* and title CRIMINAL LAW AND PROCEDURE Vol IX pp 413 425

(m) Probation of Offenders Act 1907 (7 Edw 7 c 17) s 1 (1) The circumstances which they may take into consideration are the character antecedents age health or mental condition of the defendant or the trivial nature of the offence or the extenuating circumstances if any under which the offence was committed and see title CRIMINAL LAW AND PROCEDURE Vol IX pp 413 425 There is some doubt as to whether the provision applies to the case of an adult who could not have been tried by the justices if he had not pleaded guilty compare the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 16 (repealed by the Probation of Offenders Act 1907 (7 Edw 7 c 17)) The conditions under which the defendant may be discharged are to be delivered in writing to the defendant (*ibid* s 2 (3)) Among them is one for the supervision of the probation officer (*ibid* s 2 (1))

Probation officers may be appointed for each petty sessional division in the same manner as clerks to justices are appointed (*ibid* s 3 (1) see p 611 *post*) and receive the salary fixed by the authority which appoints them The authority may relieve them of their office (Probation of Offenders Act 1907 (7 Edw 7 c 17) s 3 (4) (6)) The person specified for supervision of a case is ordinarily to be one of the probation officers appointed for the petty sessional division in which the justices act (*ibid* s 3 (3) (a)) but if they think it expedient the justices may appoint an officer from another petty sessional division or a person who is not a probation officer at all (*ibid*) Special probation officers are appointed for children and act in cases where the defendant is under sixteen years of age (*ibid* s 3 (2))

The duties of a probation officer are defined as being (1) to visit or receive reports from each person under his supervision at reasonable intervals as stated in the order or as he may think fit (2) to see that the conditions imposed are observed (3) to report to the court on the behaviour of persons under their supervision (4) to advise as to befriend and when necessary to find suitable employment for persons under their supervision (*ibid* s 4) The City of London and each metropolitan police court district are regarded as separate petty sessional divisions for this purpose (*ibid* s 3 (7))

Other conditions which the justices may impose are (1) a prohibition from associating with thieves and other undesirable persons (2) abstinence from intoxicating liquor where the offence charged was due to drink see *R v Davies* [1909] 1 K B 392 (3) generally for securing that the defendant should lead an honest and industrious life (Probation of Offenders Act 1907 (7 Edw 7 c 17) s 2 (2)) The extent of the power conferred by this provision is as yet undefined The conditions may be varied or the recognisance on which they are imposed discharged by the justices as they think fit (*ibid* s 5) As to the power of quarter sessions to sentence a prisoner on breach of condition, see *R v Spratling* [1911] 1 K B 77

(n) Probation of Offenders Act 1907 (7 Edw 7 c 17) s 1 (3) If the statute under which the offence is charged permits of higher damages being



## SECT 5

## Judgment

Restitution  
orders  
property in  
possession of  
police

**1270** The justices have power to direct the delivery of property of any kind which has come into the possession of the police in connection with any criminal charge to the person who appears to them to be the owner of it on the application of the person claiming it or of the police themselves (o). If the owner cannot be ascertained the justices may make such order as they think fit (p) but property left in the hands of the police cannot be sold and the money appropriated for a year (q). Any person claiming to be the true owner can take proceedings for the recovery of property dealt with by an order of the justices from the person in whose possession it is at any time within six months from the date of the order (a).

property not  
in possession  
of police

**1271** Property which has not passed into the possession of the police (b) may be the subject of an order of restitution by justices if it has been stolen or in certain circumstances if it has been obtained by false pretences (c).

Return of  
property to  
defendant

**1272** Where the justices have before them a report of the police giving particulars of the property taken from the defendant they may direct the return of the property or of any portion of it to him or to any other person named by him if they are of opinion that the

paid the amount specified in the statute may be allowed by the justices (Isolation of Offenders Act 1907 (7 Edw 7 c 14) s 1 (3)). As to ordering payment by the parent or guardian in the case of a person under sixteen see title CRIMINAL LAW AND PROCEDURE Vol IX p 424 and generally as to proceedings against children and young persons juvenile court and evidence in relation thereto see titles CRIMINAL LAW AND PROCEDURE Vol IX pp 315 note (n) 325 362 *et seq* 371 *et seq* 422 *et seq* EVIDENCE Vol XIII p 569 INFANTS AND CHILDREN Vol XVII pp 170 *et seq* 176 *et seq*.

(o) Police (Property) Act 1897 (60 & 61 Vict c 30) s 1 (1). It includes property coming into the hands of the police from a pawnbroker who suspects that it is stolen property (see Pawnbrokers Act 1872 (35 & 36 Vict c 93) s 34 and title LAWNS AND FIELDS) or in the Metropolitan Police District from any person who suspects that it is stolen property (see Metropolitan Police Act 1839 (2 & 3 Vict c 41) s 66 City Police Act 1839 (2 & 3 Vict c xciv) s 48 and title POLICE) or in the case of any person arrested without a warrant under the Larceny Act 1861 (24 & 25 Vict c 96) s 103. The power may be exercised by one justice. As to the powers of a metropolitan police magistrate see p 517 *ante*.

(p) Police (Property) Act 1897 (60 & 61 Vict c 30) s 1 (1).

(q) *Ibid* s 2 (3). If the property is perishable or inconvenient to keep it may be sold but the proceeds must be kept till the period of a year is complete (*ibid*).

(a) *Ibid* s 1 (2). The right ceases by statute after the six months (*ibid*).

(b) Larceny Act 1861 (24 & 25 Vict c 96) s 100. See the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 27 (3). But this does not apply where the offence is one against the Larceny Act 1901 (1 Edw 7 c 10) (see *I v Brockwell* (1905) 69 T P 376) nor to current coin which is passed as such unless in the possession of the thief or as in the case of a £5 gold piece kept not as a coin but as a curiosity (*Moss v Hancock* [1899] 2 Q B 111). The order may be either for the restitution of the goods or of their proceeds but not of both (*P v London County Justices Ex parte Dettmer & Co* (1908) 72 J P 513). See further title CRIMINAL LAW AND PROCEDURE Vol IX pp 684 *et seq*.

(c) See title CRIMINAL LAW AND PROCEDURE Vol IX pp 701 702 and *Ranson v Platt* [1911] 2 K B 291. As to the special powers of metropolitan police magistrates see pp 576 577 *ante*.

interests of justice and the safe custody of the defendant himself are not endangered thereby (d) but the order must be made while the defendant is before the court and not after conviction (e)

SECT 5  
Judgment

### SECT 6 — *Recongnisance*

**1273** The justices may order any person to enter into a recognisance and find securities to keep the peace or to be of good behaviour towards the person applying to them for such order (f) or generally (g) but the person against whom it is sought to obtain the order must be brought before the justices upon a complaint when the facts are ascertained and the case decided in the same manner as any other complaint under the Summary Jurisdiction Acts (h). If the justices make such an order and the defendant fail to comply with it he may be imprisoned (i).

To keep the  
peace

**1274** In the exercise of their summary jurisdiction powers justices may require a defendant to enter into a recognisance with or without securities for his appearance on any adjournment of the hearing whether made in the ordinary course of the hearing or on account of variance in the information complaint summons or warrant and the evidence adduced or on account of the non appearance of the informant or complainant or on appeal to quarter sessions or by special case (l).

On a return  
to justices  
quorum

**1275** On the other hand they may dispense with any statutory requirement as to the defendant entering into a recognisance and finding sureties for keeping the peace or performing any other condition whether the punishment specified by statute is imprisonment or a fine (l) and where a defendant has been committed to prison in default of finding sureties they may dispense with the sureties or reduce the amount in which they are bound or use their

Dispensing  
with  
defendant's  
recognisance

(d) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 44. The power may be exercised by one justice.

(e) *R v D Eyncourt* (1888) 21 Q B D 109.

(f) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 2. The powers given may be exercised by one justice or by a court of summary jurisdiction whether a petty sessional court or not.

(g) Probation of Offenders Act 1907 (7 Edw 7 c 17) see p 60 ante. The order may be made although the date fixed for the proceeding which threatened to cause a breach of the peace has passed (*Ex parte Wise* (1910) 74 J P 7).

(h) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 2. The former practice of granting an order on the oath of the informant in a manner similar to that in which articles of the peace are ordered by quarter sessions (see p 633 post) is abolished by this provision.

(i) If a defendant in default of compliance is brought before a court of petty sessions he may be sentenced to six months imprisonment but if before a single justice only or justices in a court of summary jurisdiction which is not a petty sessional court then to fourteen days only.

(l) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) ss 3 9 13 16. Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) ss 20 (11) 31 38. Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 3. If entered into under the last Act they must be forwarded for enforcement to the clerk of the peace (*ibid* s 13) but if under the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) they need not be so transmitted except where a person seeking to put in force a recognisance to keep the peace or be of good behaviour so requires it by notice in writing (*ibid* s 3 (3)).

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 4.

**SECT 6**  
**Recog**  
**niscances**

Amount  
Before whom  
entered into

discretion in dealing otherwise with the case, if upon inquiry into the case and upon the production of new evidence they think right so to do (*m*)

**1276** The amount in which the principal and sureties are to be bound must be fixed by the justices but the recognisances may be actually entered into before any other justice or justices, or before a clerk to justices, or before a superintendent or inspector of police or then equal in rank or the officer in charge of a police station or where any of the parties is in prison before the governor or keeper of the prison (*n*)

Forfeiture of  
recognisance  
Distress

**1277** If the justices in relation to proceedings before whom the recognisance was ordered consider it to be forfeited they may declare it to be forfeited and enforce payment by distress (*o*) but at any time before a sale is effected of the goods distrained they may cancel or mitigate the forfeiture upon the defendant's application and upon his giving security to their satisfaction for the future performance of the conditions required, and for the payment of the costs incurred by the forfeiture or upon such other conditions as they think fit (*p*)

Imprison  
ment

If the justices are satisfied by information on oath that a person whom they have caused to enter into a recognisance under the Probation of Offenders Act 1907 (*a*) has failed to observe any of the conditions imposed on him they may secure his attendance before them by warrant or summons and on being satisfied of his default, may convict and sentence him forthwith for his original offence without further proof of his guilt (*a*) If the person in default is under twelve years of age they may order him to be sent to a certified industrial school (*b*)

(*m*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 26 The mode of application for such variation of the conditions is an application for a summons requiring the complainant to show cause to the contrary (Summary Jurisdiction Rules 1886 r 17)

(*n*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 42 The governor of a prison is not required to accept any surety unless he receives a certificate from the justices or their clerk that the proposed surety is able if required to pay the amount in which he is to be bound (Summary Jurisdiction Rules 1886 r 13 see note (*l*) p 616 *post*)

(*o*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 44 (2) Forfeited sums are to be paid to the clerk to the justices and dealt with by him in the same manner as unappropriated fines (*ibid* s 9 (4) see p 603 *ante* and p 615 *post*) As to procedure on distress see title DISTRESS Vol XI pp 221 *et seq*

If the principal commits any offence which is in law a breach of the conditions of the recognisance the justices may by conviction declare the recognisance forfeited and require payment by the principal and sureties of the sums for which they are bound (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 9 (2) )

(*p*) *Ibid* s 9 (1)

(*a*) 7 Edw 7 c 17 s 6 (1) (5) If brought in the first instance before a court of summary jurisdiction other than the one making the order the court may remand him in custody or in bail to the court which made the order (*ibid* s 6 (2) (3) (4) )

(*b*) *Ibid* s 6 (4) see the Children Act 1908 (8 Edw 7 c 63) s 57 and title EDUCATION Vol XII p 71 As to ordering a parent or guardian to give security see title CRIMINAL LAW AND PROCEDURE Vol IX, p 424 and as to binding persons under sixteen see *ibid* p 425

**1278** The justices may accept security from a party before them for the payment of a sum of money or of an instalment thereof (c), or for the due performance of the conditions of a recognisance (d), or for the prosecution of an appeal to quarter sessions (e). Such security whether given by a principal or surety, may be given by the deposit of money with the clerk to the justices or by an oral or written acknowledgment of the undertaking or conditions by which and the sum for which the party is bound (f).

SECT 6  
Recognisances

Security for payment or money etc

A sum due in pursuance of a security from a principal may be recovered in the same manner as a fine if the security was given in regard to a sum adjudged payable by a conviction or in the same manner as a civil debt if the security was given for any other purpose (g). A sum due from a surety is recoverable in every case as a civil debt (h) and a sum paid by a surety on behalf of his principal may be recovered by him in the same manner (i).

Recovery of amount secured

### SECT 7 —*Recovery of Civil Debts*

**1279** A civil debt is a sum of money claimed to be due and recoverable in a court of summary jurisdiction upon complaint and not upon information (k). Justices have power to entertain a complaint for a civil debt and to issue a summons thereon but they may not issue a warrant for the apprehension of the defendant if he fails to appear (l). The summons must have either contained in it or annexed to it particulars of the sum claimed (m).

Definition of civil debt

(c) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 7 (3). Where security is so given the payment of the sum of money secured must be enforced by means of it instead of any other means (*ibid* s 23 (5)).

(d) *Ibid* s 9.

(e) *Ibid* s 31 (3) (4).

(f) *Ibid* s 23. The Summary Jurisdiction Rules 1886 provide a form for a security (*ibid* r 14) and contain regulations as to the duties of the clerk to the justices in regard to recording it and giving notice of forfeiture (*ibid* rr 15 16) see p 616 *post*.

(g) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 23 (3). As to such modes of recovery see p 604 *ante* and the text *infra*.

(h) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 23 (2).

(i) *Ibid* s 23 (4).

(k) *Ibid* s 6. The words "and not upon information" mean that the term "civil debt" is confined to cases where a complaint is the proper mode of proceeding and to emphasise the exclusion of criminal matter from the provision (*R v Kerswill* [1895] 1 Q B 1). No fine nor penalty for an offence whether of a public or quasi public character can be recovered as a civil debt (*R v Paget* (1881) 8 Q B D 151) but the fact that a particular statute provides that a debt due may be recovered as if it was a penalty under that Act does not constitute the debt anything but a civil matter (*R v Master* (1869) L R 4 Q B 285). Poor rates are not recoverable as a civil debt (*R v Price* (1880) 5 Q B D 300 see *Seaman v Bayley* [1896] 2 Q B 344 C A and title RATES AND RATING) but a district rate is so recoverable (*Southwark and Vauxhall Water Co v Hampton Urban Council* [1899] 1 Q B 273 C A) and so is a sum due for maintenance of a pauper relation (*Re Gamble*, [1899] 1 Q B 305, see title POOR LAW).

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 35 (1).

(m) Summary Jurisdiction Rules, 1886, r 19.

SECT 7

Recovery of  
Civil DebtsEnforcement  
of order

**1280** If at the hearing the justices decide that the sum claimed is due they may make an order for the payment of it and of costs (n) but they cannot enforce their order by imprisonment in default of distress or otherwise unless the defendant either has or has had since the date of the order the means to pay the sum adjudged to be due and has neglected or refused or does neglect or refuse to pay it (o). In the case of such neglect or refusal the justices making the order, or any other justice having jurisdiction in the same area may exercise the power of imprisonment given to a county court by the Debtors Act 1869 (p) but before doing so a judgment summons must be issued and served on the defendant calling upon him to appear and be examined upon oath (q). At the hearing of the judgment summons the defendant may be called upon to give evidence (r) and any witness may be summoned to prove the means possessed by the defendant in the same manner as witnesses are summoned to give evidence on the hearing of a complaint (s). The issuing of the summons may be adjourned from time to time (t).

Commitment  
of defendant

**1281** If after hearing the evidence adduced the justices determine to commit the defendant to prison the order of commitment must bear the date of the day it is made (a) and must have indorsed on it the amount on payment of which the defendant will be discharged (b). That amount will include the costs if any given to the plaintiff for endeavouring to enforce the order (c).

Discharge of  
defendant on  
payment

**1282** The defendant is entitled to be discharged before commitment if he pays the prescribed amount to the officer holding the order (d) or after commitment on payment to the clerk to the justices who made the order or to the governor of the prison (e).

(n) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 35

(o) *Ibid* s 35 (2) see title DISTRESS Vol XI p 224

(p) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 3, (2) Debtors Act 1869 (32 & 33 Vict c 62) and see title BANKRUPTCY AND INSOLVENCY Vol II pp 341 *et seq*

(q) Summary Jurisdiction Rules 1886 r 20. The service must take place two clear days before the day appointed for the appearance of the defendant (*ibid* r 23). It is to be served personally wherever practicable but if it appears on oath that prompt personal service is for any reason impracticable the court may make an order for substituted service as they think proper (*ibid* r 21). The summons may be issued although no distress warrant is applied for and its service when made out of the jurisdiction of the court issuing it may be proved by affidavit or solemn declaration (*ibid* r 22).

(r) *Ibid* 20

(s) *Ibid* 25

(t) *Ibid* 24

(a) *Ibid* 26

(b) *Ibid* rr 27 28

(c) *Ibid* r 29 see the Debtors Act 1869 (32 & 33 Vict c 62) s 5

(d) Summary Jurisdiction Rules 1886 r 27. The officer must pay over the sum to the clerk to the justices (*ibid*).

(e) *Ibid* r 28. If payment is made to the governor of the prison (see title PRISONS) a sufficient amount must be added to cover the cost of transmission by post office order or otherwise to the clerk to the justices.

## Part IX — Procedure not under Summary Jurisdiction

PART IX  
Procedure  
not under  
Summary  
Jurisdiction

**1283** The preliminary examination before justices of persons charged with the commission of indictable offences is regulated by the Indictable Offences Act 1848 (*f*) and is dealt with elsewhere

Preliminary  
examination  
in indictable  
cases

Warrants or orders issued or made by justices in regard to the removal of paupers and complaints or orders made to or by them with respect to lunatics are excepted from the operation of summary jurisdiction procedure and are dealt with elsewhere (*g*)

Paupers and  
lunatics

Bastardy matters also dealt with elsewhere are similarly excepted (*h*) save as to the backing of warrants for the apprehension of a putative father the levying of sums to be paid under an order of justices or imprisonment in default and the conditions of appeal (*i*)

Bastardy

## Part X — Clerks to Justices

### SECT. 1—*In General*

**1284** A clerk is appointed for every petty sessional division of a county and for every borough having separate commission of the peace (*l*)

Where  
appointed

The appointment is made in counties by the justices acting in and for the petty sessional division (*l*) and in boroughs having a separate commission of the peace by the justices of the borough (*m*). In boroughs which have no separate commission the appointment is made by the justices acting in and for the petty sessional division of the county. A clerk cannot be appointed by the mayor and ex mayor for borough business only (*n*)

By whom  
appointed

Where special or petty sessions are usually held at more than one court house or place in a petty sessional division a separate clerk may be appointed in respect of each such place (*o*) and in any case the

More than one  
clerk in a  
division

(*f*) 11 & 12 Vict c 42 see title CRIMINAL LAW AND PROCEDURE Vol IX pp 311 *et seq*

(*g*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 35 see titles LUNATICS AND PERSONS OF UNSOUND MIND pp 399 *et seq ante* POOR LAW

(*h*) See title BASTARDY Vol II pp 443 *et seq*

(*i*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 35 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 54 See title BASTARDY Vol II pp 443 *et seq*

(*l*) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 5 Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 159 Local Government Act 1888 (51 & 52 Vict c 41) s 84

(*m*) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 5

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 53) s 159 (1)

(*o*) *Huntingdon Corporation v Huntingdon County Council* [1901] 2 K B 257 but the county justices may appoint a second clerk for the division which includes the borough (*ibid*)

(*o*) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 5 (1)

SECT 1  
In General

appointment of more than one clerk may be authorised by the Secretary of State on the application of the local authority (p)

Qualification

**1285** The qualification required in the case of a clerk either to county or borough justices is that he must either (1) be a barrister of not less than fourteen years standing or (2) be a solicitor of the Supreme Court or (3) have served not less than seven years as clerk to a stipendiary or police magistrate or to either a metropolitan or City of London police court (q). But exception is made in the case of one who has acted as or as the assistant of a justices clerk for a period of fourteen years, if in the opinion of the justices making the appointment there are special circumstances which make his selection desirable (r)

Disqualification

**1286** No clerk of the peace for a county or borough or his deputy or the partner of either may be appointed clerk to the justices of a petty sessional division or of a borough within the county (s) and in the case of a borough no alderman nor councillor of a borough may be appointed clerk to the justices of the borough (t)

The office of justice and that of clerk to justices are incompatible (a)

A clerk to borough justices is forbidden under pain of a heavy penalty from being directly or indirectly employed or interested by himself or his partner or otherwise in the prosecution of any offender committed for trial by the justices for whom he acts as clerk at any court of gaol delivery or quarter sessions (b)

There is no similar provision in regard to counties but the practice of acting in such circumstances has been discountenanced (c)

Tenure of office

**1287** The clerks to justices both in counties and boroughs hold office during the pleasure of the justices (d). They may therefore be dismissed at any time (e), and upon dismissal have no claim to compensation for loss of their emoluments (f)

(p) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 5 (4)

(q) *Ibid* s 7

(r) *Ibid*

(s) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 7. Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 159 (2). Certain exceptions to this rule were made by these statutes in favour of persons already holding the office in 1877 and 1861 respectively

(t) *Ibid* s 159 (2)

(a) See p 551 *ante*

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 159 (3) (4)

(5) The penalty is £100 half of which is payable to the person bringing the action to recover it. Where a clerk to the justices of a borough which had no quarter sessions of its own was in partnership with the holder of the office of clerk of the peace for the county and by agreement with him received half the fees payable to the clerk of the peace it was held under the Municipal Corporations Act 1835 (5 & 6 Will 4 c 76) which the Municipal Corporations Act 1882 (45 & 46 Vict c 50) repeals and replaces that the clerk had committed an offence (*R v Fox* (1859) 1 E & E 729)

(c) See *R v Bushell* (1888) 52 J P 136 *per* Lord COLERIDGE C J

(d) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 5. Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 159 (1)

(e) *Ex parte Sandys* (1833) 4 B & Ad 863. *E v Fox* (1858) 8 E & B 239. *E v Bodmin Corporation* [1892] 2 Q B 21

(f) Criminal Justice Administration Act, 1851 (14 & 15 Vict c 55), s 9

**1288** Every person holding the office of clerk to justices must be paid by salary (g), and the fees which were formerly payable to him are now collected by him and paid to the local authority (h)

SECT 1  
In General  
Salary and fees

(g) Justices clerks were formerly paid by fees but payment by salary became permissible in 1851 under the Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 9 and compulsory in 1878 under the Justices Clerks Act 1877 (40 & 41 Vict c 43) s 2. The salary to be paid to a clerk is to include and to be deemed the remuneration for all business which he may by reason of his office be called on to perform (Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 10). Under that Act certain classes of business might be excepted but the exception was abolished by the Justices Clerks Act 1877 (40 & 41 Vict c 43) s 3 and the only business for which justices clerks may receive fees for their own use is the giving copies of depositions (*ibid*). The amount of the salary is to be determined or varied upon reconsideration by the Secretary of State upon the recommendation of the local authority (Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 9. Justices Clerks Act 1877 (40 & 41 Vict c 43) s 2). The local authority subject to the following exception is the standing joint committee of the county council and quarter sessions (Local Government Act 1888 (51 & 52 Vict c 41) ss 30-84) in the case of boroughs which had separate commissions of the peace before 1878 the borough council is the local authority (*Thetford Corporation v Norfolk County Council* [1898] 2 Q B 468 (CA)) but no order for the determination or variation of the salary may be made in the case of a borough without the approval by a meeting of the borough justices of the recommendation made by the council (Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 9). Where no recommendation is made the Secretary of State may fix the salary upon his own initiative (Justices Clerks Act 1877 (40 & 41 Vict c 43) s 2) except in the case of boroughs which have received a separate commission of the peace since the 1st February 1878 in which case in the absence of a recommendation by the council it is presumed that the clerk to the justices would be entitled to claim the fees. The salary is payable in the case of petty sessions of a county by the county council (Local Government Act 1888 (51 & 52 Vict c 41) s 84 (2)) and this includes boroughs which have no separate commission of the peace but in which a court of petty sessions for the county is held (*Huntingdon Corporation v Huntingdon County Council* [1901] 2 K B 257) and see title LOCAL GOVERNMENT p 359 *ante*. In the case of boroughs having a court of quarter sessions it is payable out of the borough fund (Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 9 see *Thetford Corporation v Norfolk County Council supra* overruling *Ex parte Kent County Council* and *Dorset Council* *Ex parte Kent County Council* and *Sandwich Council* [1891] 1 Q B 389 and *Re Herefordshire County Council* and *Leominster Borough Town Council* and *Re Local Government Act 1888* [1895] 1 Q P 43) and see title LOCAL GOVERNMENT pp 319-320 *ante*. County boroughs having no quarter sessions of their own are to contribute to the expenses of the petty sessions of the county (Local Government Act 1888 (51 & 52 Vict c 41) s 32) and see title LOCAL GOVERNMENT p 353 *ante*. The amount of the clerk's salary may if it is thought fit be made to vary according to the amount of business (Justices Clerks Act 1877 (40 & 41 Vict c 43) s 2 and see Home Office Circular 16th December 1901). As to the salary of the clerks of metropolitan police magistrates and stipendiary magistrates see pp 616-617 *post*.

(h) Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 11. Justices Clerks Act 1877 (40 & 41 Vict c 43) s 9. As to the local authority see note (g) *supra*. The fees to be collected by the clerks to justices are those set out in a table of fees submitted by the local authority and approved by the Secretary of State who has power to alter it due regard however being had to the principle that the amount likely to be received in respect of them should be



## SEC. 1

## In General

Penalty for  
demand of  
excessive fee

Recovery of  
fees where no  
order as to  
costs

Remission of  
fees

Deputy

Duties of  
clerk in  
general

Any clerk who demands a fee greater than that duly authorised (i) commits an offence for which he is liable to a penalty of £20 (k)

When there is no order of the justices as to costs the amount of the fees due to the clerk is a simple debt payment of which is to be enforced in a county court against a prosecutor or informant who is personally liable (l)

The fees due to a clerk to justices may be remitted by the justices before whom the proceedings were had in regard to which the fees were payable (m) A record of fees so remitted is contained in the remitted fee book kept by the clerk (n)

**1289** When any other person acts as the clerk to a court of summary jurisdiction he is to be deemed to act as the deputy of the clerk and is to make a return to the clerk of all matters done by the court and of all matters which the clerk of the court is required to enter in a register or otherwise to record (o)

**1290** The duties of a clerk to justices in every petty sessional division of a county comprise the duties of clerk of petty sessions clerk of special sessions and clerk of any justice or justices of the peace (p)

The duties of a clerk to justices in a borough having a separate commission of the peace are of a similar nature

equivalent to the amount to be paid by way of salary to the clerks (Justices Clerks Act 1877 (40 & 41 Vict c 43) s 8) Formerly the table of fees was settled by the justices at quarter sessions subject to the approval of the justices of assize or in Middlesex the Lord Chief Justice of England compare Justices Clerks Fees Act 1753 (26 Geo 2 c 14) The table of fees may be revised from time to time by the Secretary of State upon complaint that the amount received in respect of them is either more or less than equivalent to the clerk's salary He may require a statement of fees actually received to be submitted to him by the local authority and a new table to be compiled by them and in default of their complying with his requisition he may compile the revised table himself (Justices Clerks Act 1877 (40 & 41 Vict c 43) s 8)

(i) As to the authorised table of fees see note (h) p 613 *supra*

(j) Justices Clerks Fees Act 1753 (26 Geo 2 c 14) s 2 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 30 The penalty may be recovered by anyone who will sue for it and the venue is local (*Leuis v Davis* (1875) L R 10 Exch 86 Fx Ch) Where however the extra fee is demanded by the clerk under a *bona fide* mistake of fact he would appear not to be liable to the penalty (see *Bowman v Blyth* (1856) 7 E & B 26)

(l) *Drew v Harris* (1849) 14 J P 26 but where the person sued is not personally liable as for instance a stationmaster who gives a person in charge for an offence committed at a railway station and appears before the justices to give evidence but is not the prosecutor payment cannot be enforced against him (*Reddish v Hutchinson* (1878) 48 L J (M c) 31) It is no ground for enforcing an order on overseers for payment of money for fees due to a constable to show that the constable had already paid fees due to a clerk to justices and sought to reimburse himself (*Neethrop Overseers v Whitcoat* (1863) 9 L T 383)

(m) Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 12

(n) Summary Jurisdiction Rules 1886 r 10 The form of the book is prescribed in *ibid* Sched Part III and provides for record of (1) the date (2) nature of business (3) amount of fees (4) reason for remission (5) signature of justices As to the remission of penalties or payment of fine to an informant towards the payment of his costs see p 603 *ante*

(o) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 48

(p) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 5

**1291** It is the duty of every clerk to justices to keep a register containing the minutes or memoranda of all convictions and orders of the court (q) together with such particulars as are required by the rules made under the Summary Jurisdiction Acts (r). Each entry in the register relating to proceedings before a petty sessional court must be made or signed by one of the justices constituting the court (s) but where the proceedings are before a court of summary jurisdiction not a petty sessional court a return made or signed by the justices or one of the justices constituting the court may be sent to the clerk and entered by him in the register (a).

Sect 1

In General

(1) To keep the register

The register or any extract therefrom certified by the clerk is *prima facie* evidence of the matters contained therein for the information of a court of summary jurisdiction acting for the same county borough or place as that for which the register is kept (b). Production of it does not dispense with legal proof of a previous conviction or order made against a defendant (c) unless made in the same court and in regard to a similar matter (d). It must be open for inspection without charge by any justice or any person authorised by any justice or the Secretary of State (e).

Effect of the register in evidence

Inspection

**1292** A clerk to justices is required to keep an account of the fines and penalties imposed by the justices for whom he acts (f) and this account is kept by him in conjunction with the account of fees received (g). The account is to be rendered to the treasurer

(11) To keep account.

To whom rendered

(g) Summary Jurisdiction Act 1879 (42 & 43 Vict c 79) s 22

(i) Summary Jurisdiction Rules 1886 r 3. The register itself must show (1) the number of cases (2) the name of informant or complainant (3) the name of the defendant and his age if under sixteen (4) the nature of the offence or matter of complaint (5) the minute of adjudication (6) the justices adjudicating (*ibid* Sched Part III)

(s) Summary Jurisdiction Act 1879 (42 & 43 Vict c 79) s 22 (4)

(a) *Ibid* Summary Jurisdiction Rules 1886 r 5

(b) Summary Jurisdiction Act 1879 (42 & 43 Vict c 79) s 22 (2)

(c) *Ibid*

(d) *London School Board v Harvey* (1879) 4 Q B D 451. *Police Commissioner v Donohoe* [1903] 1 K B 895

(e) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 22 (6)

(f) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 6. Summary Jurisdiction Rules 1886 r 6

(g) *Ibid* Sched Part III. The form there prescribed provides for a record of (1) date of any order made (2) name of the person by whom the fine or fee is payable and in the case of a fine the name of the parish township or place in which the offence was committed (3) nature of the offence or proceeding (4) date of committal if any (5) amount of the fine (6)—(10) appropriation of the fine to the police the Exchequer or other persons deductions etc and net amount payable to the treasurer (11) total fees (12)—(15) appropriation of fees to police clerk of the peace and other persons deductions etc and net amount payable to the treasurer. Where payment of a fine is deferred or made by instalments the fact must be noted under a separate heading.

Remarks (*ibid* r 7) and in the case of fines payable by instalments each receipt must be recorded in a book kept for that purpose (*ibid* r 9). A local authority may vary the form in which the account is to be kept (*ibid* r 6) but where accounts are kept in any form prescribed or authorised by the rules the clerk is dispensed from the duty of rendering other accounts relating to the same particulars (Summary Jurisdiction Rules, 1886, r 8).

SECT 1  
In General

of the local authority (h), to whom the fees and such of the fines as are not otherwise appropriated by statute are payable quarterly or at any less interval as may be directed by that authority (i) He must keep a separate record of fines payable to the Exchequer, and render account thereof quarterly to the Secretary of State on the 10th day of January April July and October (j)

Penalty for  
omission to  
account

Wilful omission by a clerk to justices to account for or pay any fee or fine received by him renders him liable to a penalty of £20 for every such omission (k)

(iii) To keep  
the security  
book

**1293** The clerk must also keep a security book for the record of every security given in relation to any proceeding before the justices whose clerk he is (l) The book or any certified extract therefrom is *prima facie* evidence in the same manner as the register of the facts stated therein (m) Where a security is forfeited it is the duty of the clerk to serve notice thereof on the principal two clear days before issue of a warrant of distress (n) Forfeited securities are to be applied by the clerk in the same manner as unappropriated fines (o)

SECT 2 — *Clerks to Metropolitan Police Magistrates*

Appointment  
and salary

**1294** The clerks and other officers of the various police courts established in the metropolitan police court districts are appointed by the Secretary of State (p) Their salaries are charged upon the Metropolitan Police Fund (q)

(h) The local authority is in the case of clerks of petty sessional divisions of counties the county council in the case of clerks to borough justices the borough council (Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 11 Local Government Act 1888 (51 & 52 Vict c 41) s 84 and see *Thetford Corporation v Norfolk County Council* [1894] 2 Q B 468 C A)

(i) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 6 As to the application of unappropriated fines inflicted by borough justices in non county and non quarter sessions borough see *George v Thomas* [1910] 2 K B 951

(j) Summary Jurisdiction Rules 1886 r 11 The record must contain (1) the date (2) the name of the person fined (3) the Act under which the fine was imposed (4) the amount of the fine (5) the name of the person by whom it was received (6) if any fine already remitted the date and the person to whom sent (7) particulars as to any forfeiture (8) remarks (*ibid* Sched Part III)

(k) Justices Clerks Act 1877 (40 & 41 Vict c 43) ss 6 9 The penalty may be recovered by any person who sues for it (*ibid*)

(l) Summary Jurisdiction Rules 1886 r 15 The record must show whether the person bound is bound as principal or surety the sum in which and the undertaking or condition by which he is bound the date of the security and the person before whom it is taken (*ibid*) Where not entered into before the court or the clerk of the court a return is to be made by the person before whom it was entered into and is to be recorded by the clerk (*ibid*) The clerk may issue a certificate that he is satisfied of the ability of a proposed surety to pay the amount in which he is to be bound for the information of the governor of a prison (*ibid* r 13 see note (n), p 608 *ante*)

(m) Summary Jurisdiction Rules 1886 r 15

(n) *Ibid* r 16

(o) *Ibid* r 12

(p) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s

(q) Metropolitan Police Courts Act 1897 (60 & 61 Vict c 26) s 1 see **title POLICE**

In order to be eligible as chief clerk of any of the police courts established in the metropolitan police court districts a person must be a solicitor of the Supreme Court or have served as clerk in one or more of the said police courts or as clerk to the justices of a petty sessional division within the Metropolitan Police District for at least seven years (v)

No clerk appointed to any of the first established courts (s) may hold any other office or employment whatever (t)

SECT 2  
Clerks to  
Metropolitan Police  
Magistrates

Qualification

**1295** Their duties are the same as those of clerks to justices (u)

Duties

The fees and fines collected by them are to be accounted for and except fines otherwise appropriated by statute, are payable to the Receiver of the Metropolitan Police District (i)

Account of  
fees

**1296** The fees which are authorised are settled by statute and a table in which they are set out must be fixed in a conspicuous place in each of the police courts (w) Where a fee is due but not paid the magistrate has power to summon the debtor and make an order for its payment with costs (a) In default of payment he may issue a warrant of distress for the recovery of the amount due and costs (b)

Fees

### SECT 3 — Clerks to Stipendiary Magistrates

**1297** Clerks to stipendiary magistrates (c) are appointed by the magistrates themselves and are removable at their pleasure (d) Their salaries are payable by the local authority and in the event of dispute the difference is to be determined by the Secretary of State (e)

Appointment

Salary

Only solicitors in actual practice are eligible for the appointment (f)

Qualification

They may not be concerned, either by themselves or their partners, in any matter before the magistrate for whom they act as clerk or in any matter arising out of or consequent thereon upon pain of dismissal (g)

Disqualification

(r) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 5

(s) As to these courts see note (d) p 548 ante

(t) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 5 and 1840 (3 & 4 Vict c 84) s 7

(u) See pp 614 616 ante

(v) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) ss 46 47 The magistrates are responsible for delivery of the accounts (*ibid* s 46) As to the position and duties of the Receiver see title POLICE Fees for the execution of summonses and warrants are to be applied for the benefit of the Police Superannuation Fund (*ibid* s 46 Police Act 1890 (53 & 54 Vict c 45) s 36 Sched IV, see title POLICE

(w) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 43 and see *ibid* Sched A

(a) *Ibid*

(b) *Ibid*

(c) See p 547 ante

(d) Stipendiary Magistrates Act, 1863 (26 & 27 Vict c 97) s 6

(e) *Ibid*

(f) *Ibid*

(g) *Ibid* and see p 547 ante

SECT 9  
Clerks to  
Stipendiary  
Magistrates

Duties

Fees

A count of  
fees

They are required to do all such duties as are performed by the clerks to justices generally (*h*)

**1298** The fees which they may charge are those authorised to be taken by the clerks to justices acting for the county in which the court to which they are appointed is situated (*i*)

An account of fees is to be kept by the clerk and rendered to the treasurer of the local authority (*j*) to whom also the amount of fees received is to be paid quarterly (*l*)

## Part XI—Quarter or General Sessions

### SECT 1—In Counties

Meaning of  
quarter

**1299** The expression court of quarter sessions means as regards a county the justices of the county or any part of it having a separate commission of the peace in general or quarter sessions assembled (*l*)

General  
sessions

Such an assemblage may at any time, be convened on the authority of any two justices acting by virtue of the powers given to them by their commissions and constitutes a court of general sessions (*m*)

Convened  
quarterly

The court must by statute be convened once in each of the four quarters of the year (*n*)

Quarter  
sessions  
distinguishable  
from general  
sessions

At such sessions the court is a court of quarter sessions and some acts within the jurisdiction of justices at sessions can be performed at such sessions only (*o*) Quarter sessions are therefore merely a species of general sessions distinguished by the facts that they are convened at a statutory time and are the occasion when certain parts of the justices jurisdiction may alone be exercised (*p*) The distinction is not now of great value for the authority of

(*h*) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 6

(*i*) *Ibid* and see p 613 *ante*

(*j*) As to the local authority see p 613 *ante*

(*k*) Stipendiary Magistrates Act 1863 (26 & 27 Vict c 97) s 7

(*l*) Interpretation Act 1889 (52 & 53 Vict c 63) s 13 (14) compare the Local Government Act 1888 (51 & 52 Vict c 41) s 100

(*m*) *R v Mullaney* (1833) 6 C & P 96 and see title COURTS Vol IX p 82 note (*e*)

(*n*) Stat (1362) 36 Edw 3 stat 1 c 12 stat (1388) 12 Ric 2 c 10 stat (1414) 2 Hen 5 stat 1 c 4 and see title COURTS Vol IX p 83 The dates determining the period at which quarter sessions must be held are the 11th October 28th December 31st March 24th June (see title COURTS Vol IX p 83) but the justices at a meeting at the court of quarter sessions itself or at a special meeting held for the purpose are empowered to fix the next holding of the court at any day not more than fourteen days earlier or fourteen days later than these dates (Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) s 3 (1))

(*o*) 2 Hale P C 49 *R v London Justices* (1812) 15 East 632 *R v Middlesex Justices* (1843) 4 Q B 807 *R v Middlesex Justices* (1848) 5 Dow & L 580

(*p*) 2 Hawk P C c 8, s 47

justices to summon a general sessions at unusual times has fallen into desuetude (q) and general sessions other than quarter sessions are only held at the present day in the counties of London and Middlesex, to which special enactments apply (r)

SECT 1  
In Counties

**1300** When the date at which quarter sessions are to be held is fixed a precept is signed by two justices and addressed to the sheriff to summon jurors coroners gaolers and constables and to proclaim the sessions (s) The precept should be dated at least fifteen days before the sessions and public notice is usually given by advertisement issued by the clerk of the peace (a)

Precept.  
Notice

**1301** Quarter sessions may be held at any convenient place in the county (b) and the practice in certain counties is to hold them at different places in successive quarters of the year or to adjourn the sessions in any one quarter from one town to another (c)

Where held

**1302** All justices named in the commission of the peace and persons who are justices *ex officio* are entitled to attend quarter sessions

Justices who  
may sit

Two must in fact attend in order to constitute a valid sessions (d) If only one is present he has no authority to adjourn the sessions and no court of quarter sessions can be held until the next quarter (e)

Number  
required

(q) An illustration of this is that it was considered advisable expressly to authorise the holding of the special meeting of justices referred to in note (n) p 618 *ante* (Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) s 3 (1))

(r) See pp 620 621 *post*

(s) If a precept is duly issued by the justices the issue of another precept for the holding of quarter sessions by other justices is illegal (*R v Sainsbury* (1791) 4 Term Rep 451) Nobody can be compelled to attend quarter sessions unless the precept is duly issued but if the jury and all persons necessary to the holding of the sessions are present the sessions are valid in the absence of a precept (*R v Ipswich Corporation* (1706) 2 Ld Raym 1233)

(a) Archbold Practice of Quarter Sessions 6th ed 6.

(b) *R v Hayward* (1837) 6 Ad & El 590 *R v Suffolk Justices* (1847) 4 Dow & L 628 Quarter sessions for the counties of Kent Middlesex and Surrey may be held at a place within the county of London (Local Government Act 1888 (51 & 52 Vict c 41) s 42 (12)) As to those for Middlesex see p 620 *post* As to the place where quarter sessions are to be held and the accommodation to be provided compare the cases cited in note (a) p 621 *post*

(c) This is the practice in many counties In Hertfordshire quarter sessions are held alternately in the Hertford and St Albans divisions and an adjourned session is held each quarter in whichever of the two divisions the quarter sessions does not assemble in The justices of each division transact the business relating to that division Prisoners who have committed an offence in one division are to be tried in that division jurors residing in one division are to be summoned ordinarily in that division but may be summoned in the other (County of Hertford and Liberty of St Albans Act 1874 (37 & 38 Vict c 45) and County of Hertford Act 1878 (41 & 42 Vict c 50))

(d) Compare Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73), s 9

(e) *R v Polstead (Inhabitants)* (1747) 2 Stra 1263 As to the adjournment of borough sessions compare note (s) p 544 *ante* and p 640, *post*

SECT 1  
In Counties.

Chairman  
and deputy  
chairman

Adjournment  
of business

Maiden  
sessions

**1303** The proceedings of quarter sessions are presided over and their decisions given by the chairman or deputy chairman. These offices are filled as vacancies occur by the vote of the justices present (*f*). Where the justices are equally divided in opinion, the chairman and deputy chairman have no casting vote (*g*).

**1304** Business may be adjourned from one sessions to another but where it is not adjourned the orders made at one sessions cannot be dealt with at a subsequent sessions (*h*).

**1305** When it appears five days before the holding of a court of quarter sessions that there will be no business for the court to transact the holding of the court is dispensed with (*e*) and the clerk of the peace either by himself or by the sheriff or under sheriff who has summoned the jurors may give them notice not to attend (*j*). He must also inform all clerks to justices in the county of the fact that the court will not be held (*k*).

SECT 2—*In Middlesex*

Quarter  
sessions for  
the county of  
Middlesex

**1306** Quarter sessions for the county of Middlesex which before the year 1865 included the greater part of the metropolis and the subject of special statutes (*l*) the greater number of the provisions of which have been repealed (*m*).

(*f*) Beyond the inherent power of a court of quarter sessions to regulate its own procedure there does not appear to be any authority for the appointment of a deputy chairman. The possible appointment of a deputy chairman is however expressly recognised by the Quarter Sessions Act 1842 (5 & 6 Vict c 38) s 4 (now repealed). Further there does not appear to be any limit to the number which may be appointed. In the absence of both the chairman and deputy chairman the senior justice present is usually called upon to preside but this practice is not universal.

(*g*) See p 647 *post*.

(*h*) *Midland Rail Co v Edmonton Union Guardians* [1895] 1 Q B 357 C 1 affirmed [1895] A C 485.

(*i*) Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) s 2. Persons having a right to present a bill of indictment to a grand jury in a case where no person has been committed for trial are to give notice to the clerk of the peace of their intention to present one five days before the court is held (*ibid* s 1 (5) and see title JURIES Vol XVIII p 243).

(*j*) Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) s 1 (1) (2). Jurors who have received such a notice are protected from the imposition of any fine for failing to attend in pursuance of the summons (*ibid* and see title JURIES Vol XVIII p 239).

(*k*) Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) s 1 (3). Justices who have already committed or are about to commit a prisoner to the court are authorised to commit him to another court of quarter sessions or to assizes where the case may conveniently be tried (*ibid*).

(*l*) Middlesex Sessions Act 1844 (7 & 8 Vict c 71). Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) ss 13—17. Middlesex Sessions Act 1859 (22 & 23 Vict c 4). Middlesex Sessions Act 1874 (37 & 38 Vict c 7).

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) ss 42 (11) 126. The enactments respecting the times for holding sessions and the appointment and payment of an assistant judge and his deputy have ceased to apply to Middlesex (*ibid* s 42 (11)).

Intermediate sessions are still held in addition to quarter sessions  
The place of assembly is at the Guildhall Westminster (n)

SECT 2  
In  
Middlesex

SECT 3—*In the County of London*

**1307** There is a court of quarter sessions for the county of London including the whole of the administrative county with the exception of the City of London (o)

Quarter sessions in the county of London

**1308** The court is presided over by a chairman and deputy chairman each of whom is a paid officer appointed by the Crown holding office during good behaviour (p) The office is confined to barristers of not less than ten years standing (q) and the holder of it is *ex officio* a justice of the peace (r) but may not during his continuance in office serve in Parliament nor practise as a barrister (s)

Constitution of court  
Chairman and deputy chairman

Either the chairman or deputy chairman is authorised to hold sessions when sitting by himself (t)

**1309** The sessions of the court are regulated by a scheme drafted by the London County Council and approved by the Secretary of State (a) Sessions may under the scheme be arranged to take place simultaneously at different places in the county and every sessions or adjourned sessions has the same jurisdiction including the power of hearing and determining appeals as if it were a court of quarter sessions (b)

Time and place of holding courts

**1310** The court of quarter sessions for the county of London is the court of appeal from assessments to poor rate in the metropolis including the City of London on the hearing of matters relating to which two members of the court of quarter sessions of the City (c)

Jurisdiction in rating appeals

(n) Provision is made by the Local Government Act 1888 (51 & 52 Vict c 41) for the holding of the sessions in the county of London if desired but jurors must not be drawn from within that county (*ibid* s 42 (12) and see title JURIES Vol XVIII p 232)

(o) Local Government Act 1888 (51 & 52 Vict c 41) s 40 (2) As to the City of London see p 622 *post* Up to the year 1888 London with the exception of the City of London and the liberties of the Tower and of Westminster was included for quarter sessions purposes in the area of the counties—Middlesex Surrey and Kent—to which it geographically belonged The liberty of Westminster is merged in the county of London (Local Government Act 1888 (51 & 52 Vict c 41) s 48) the liberty of the Tower in the City of London see title METROPOLIS

(p) Local Government Act 1888 (51 & 52 Vict c 41) s 42 (1) (2) (3) The appointment is by the Crown on the petition of the county council and the salary is not to exceed that stated in the petition but the first holder of the office of chairman (the ex chairman of the Middlesex Quarter Sessions) was in fact appointed by that Act itself (*ibid* s 117 (b)) which further appears to have contemplated the appointment of more than one paid deputy chairman but only one has hitherto been appointed

(q) *Ibid* s 42 (1)

(r) *Ibid* s 42 (2)

(s) *Ibid* s 42 (4)

(t) *Ibid* s 42 (5)

(a) *Ibid* s 42 (7) The place at which sessions are to be held is decided by the county council (*London County Council v Standing Joint Committee* (1911) 104 L T 923) but the amount of accommodation required is decided by the standing joint committee (*London County Council v Standing Joint Committee* (1911) 27 T L R 567)

(b) Local Government Act 1888 (51 & 52 Vict c 41) s 42 (6)

(c) See p 622 *post*



**SECT 3**  
**In the**  
**County of**  
**London**

Court of  
quarter  
sessions  
(1) in the  
City

selected by that court are entitled to attend and sit as members of the court (*d*)

**SECT 4**—*In the City of London and Borough of Southwark*

**1311** The court of quarter sessions of the City of London still exists (*e*) but its jurisdiction in regard to indictable offences is concurrent with that of the Central Criminal Court which in practice exercises it exclusively (*f*) its administrative functions are transferred to the Court of Common Council and the London County Council (*g*), and its jurisdiction in rating appeals is limited to appointing two of its members to sit and act as members of the court of quarter sessions of the county of London in the hearing of appeals affecting the City (*h*)

It has thus been shorn of most of its duties and although it continues to meet eight times a year (*i*) little business remains to be transacted

(11) in the  
borough of  
Southwark

**1312** A court of quarter sessions is still held for the borough of Southwark (*k*)

**SECT 5**—*In other Boroughs*

The recorder  
the sole judge

**1313** In all other quarter sessions boroughs (*l*) whether counties of themselves or not (*m*) the court is held by the recorder (*n*) who sits as the sole judge (*o*)

Deputy  
recorders

**1314** The recorder may in case of sickness or unavoidable absence appoint a deputy to act for him at the sessions then being held or about to be held (*p*)

(*d*) Local Government Act 1888 (51 & 52 Vict c 41) s 42(10) The statute regulating such appeals is the Valuation (Metropolis) Act 1869 (32 & 33 Vict c 67) the court of appeal under which prior to the Local Government Act 1888 (51 & 52 Vict c 41) was a specially composed court of justices drawn from the counties in which the metropolis is situated (Valuation (Metropolis) Act 1869 (32 & 33 Vict c 67) s 24)

(*e*) See the Local Government Act 1888 (51 & 52 Vict c 41) s 41 title COURTS Vol IX pp 177 178

(*f*) See title COURTS Vol IX p 87

(*g*) Local Government Act 1888 (51 & 52 Vict c 41) s 41(1) Those duties of the court which would if the City were a quarter sessions borough with a population exceeding 10 000 be exercised by the borough council are transferred to the common council while those which would in such case be exercised by the county council are transferred to the London County Council

(*h*) *Ibid* s 42(10)

(*i*) See title COURTS Vol IX p 203

(*k*) *Ibid*

(*l*) For a list of quarter sessions boroughs see note (*f*) p 540 *ante*

(*m*) Local Government Act 1888 (51 & 52 Vict c 41) s 100

(*n*) As to his appointment salary etc see p 544 *ante*

(*o*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 165(1) (2)

(*p*) *Ibid* s 166(1) The sessions are not illegal or the acts of the deputy recorder invalid even if the absence of the recorder is not unavoidable (*ibid* s 166(2)) If the recorder is dead or is for any reason unable to make the appointment or to remove a person whom he has appointed the authority which has power to appoint the recorder (see p 544 *ante*) may itself appoint the deputy and in so doing may assign a suitable remuneration to him out of the salary of the recorder (Recorders Stipendiary Magistrates and Clerks of the Peace Act, 1906 (6 Edw 7, c 46), s 1) If the office of

The deputy must be a barrister of five years standing (q) and his appointment ceases with the end of the sessions in respect of which the appointment was made (r)

SECT 5  
In other  
Boroughs

**1315** On the borough council passing a resolution giving the required authority and the resolution being certified in writing to the recorder or deputy recorder by the mayor or two aldermen or the town clerk before any quarter sessions is held (s) the recorder or deputy recorder (t) may order a second court to be formed and appoint thereto an assistant recorder if it appears to him that the sessions will last more than three days (a)

Assistant  
Recorder

Second court

The person so appointed must be a barrister of five years standing (b) whose name has been at some previous time approved by the Secretary of State as that of a fit person for such an office (c)

Qualification  
of assistant  
recorder

His powers and jurisdiction are the same as those of the recorder himself (d) but they are limited in duration to such time as the recorder himself or deputy recorder is sitting in quarter sessions except for the purpose of bringing to a close proceedings the hearing of which has already been begun (e) and he may be called upon by the recorder or deputy recorder to adjourn his court at any time that the recorder or deputy recorder considers that a second court is no longer required (f)

Powers and  
jurisdiction

**1316** The jurisdiction of the court extends to all crimes offences and matters except licensing appeals cognisable by courts of quarter sessions in counties (g)

Jurisdiction  
of court

**1317** Sessions must be held once in every quarter and may be held oftener if and as the recorder thinks fit or as the Secretary of State directs (h) They must be held within the limits of the borough (i)

Time and  
place of  
holdings

#### SECT 6—The Caption

**1318** At each assembly of quarter sessions whether of a county or borough the proceedings are distinguished by a caption i.e. a formal recital of the style of the court

The caption

recorder becomes vacant the deputy may continue to act until it is filled up to a maximum of six months (*ibid*)

(q) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 166 (1)

(r) *Ibid*

(s) *Ibid* s 168 (6) (a) Where such a resolution has been carried and certified to the recorder it remains a valid authority for a period of twelve months from its date (*ibid* s 168 (7) )

(t) *Ibid* s 168 (9)

(a) *Ibid* s 168 (1) (2) As to the assistant clerk of the peace see p 626 *post* His salary and that of the assistant recorder is regulated by the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 168 (8)

Sched IV

(b) *Ibid* s 168 (1)

(c) *Ibid* s 168 (6) (b)

(d) *Ibid* s 168 (2)

(e) *Ibid* s 168 (3) The exception extends to the sentencing of a prisoner who has been tried but not sentenced (*ibid*)

(f) *Ibid* s 168 (4)

(g) *Ibid* s 165 (3)

(h) *Ibid* s 165 (1)

(i) *Ibid*

## SECT 6

The  
Caption.

## Nature

## Contents

The caption remains the same throughout the sessions (k) and documents relating to business transacted at them must be headed by a copy of it as it is a necessary part of the record (l) for the purpose of showing that the court before whom the business was transacted was one of competent jurisdiction (m)

The caption must contain the name of the county or borough (n), a statement whether the court was one of general or of quarter sessions the place where it was held and the fact that it was within the jurisdiction and the names of at least two justices holding the court (o) or in the case of a borough the recorder or deputy recorder (p)

SECT 7 — *Officers of Quarter Sessions*SUB SECT 1 — *Custos Rotulorum**Cu tos*  
*rotulorum*

**1319** The *custos rotulorum* is the principal civil officer and representative of the Crown in each county. He is appointed by the Sovereign (q) and must be one of the justices assigned to the commission of the peace for the county (r)

He has the titular custody of the records of the county and of the court of quarter sessions (s) and is entitled to exercise his office by deputy (t)

SUB SECT 2 — *Clerk of the Peace*Clerk of the  
Peace

**1320** The clerk of the peace is the principal officer of the court of quarter sessions

(k) *R v Marsh* (1837) 6 Ad & El 236 per COLLIDRIDGE J at p 249

(l) *R v Smith* (1828) 8 B & C 341

(m) *R v Yeoleley (Inhabitants)* (1838) 8 Ad & El 806 per Lord DENMAN C J at p 818

(n) This customarily appears both in the margin and in the text though perhaps this is not necessary (2 Hawk P C c 125 s 120)

(o) *Jerral v Caldwell* (1606) Cro Jac 184 *Johnson v Underwood* (1618) Cro Jac 493 It is customary to add the words and others their associates

(p) *Smith v R* (1849) 18 L J (M C) 207

(q) Stat (1540) 37 Hen 8 c 1 s 1 Up to that date 1545 the appointment had been with the Lord Chancellor a custom that was restored by stat (1549) 3 & 4 Edw 6 c 1 s 3 but the right of appointment was once more vested in the Sovereign in person by stat (1688) (1 Will & Mar c 21 s 4) Upon appointment by the Sovereign the *custos rotulorum* receives his commission from the Lord Chancellor (stat (1545) 37 Hen 8 c 1 s 2) In the county of Lancaster the appointment is made through the Chancellor of the Duchy (Lancaster County Clerk Act 1871 (34 & 35 Vict c 73) s 9) formerly the Archbishop of York had the right to appoint a *custos rotulorum* for certain liberties in Yorkshire and Nottinghamshire the Bishop of Durham for Durham and the Bishop of Ely for the Isle of Ely but their privileges were extinguished and the right transferred to the Crown in the case of the liberties in Yorkshire and Nottinghamshire and the Isle of Ely by the Liberties Act 1836 (6 & 7 Will 4 c 87) and in the case of Durham by the Durham (County Palatine) Act, 1836 (6 & 7 Will 4 c 19)

(r) *Harcourt v For* (1693) 1 Show 506 In practice the office is almost invariably united with that of lord lieutenant of the county. Formerly he had the right to appoint the clerk of the peace but this is no longer the case (see title LOCAL GOVERNMENT p 343 ante and see the text *infra*)

(s) As to their actual custody see p 627 post

(t) Stat (1545) 37 Hen 8 c 1 s 2 which so far as regards custody of records he does through the clerk of the peace (see p 627, post)

In the case of counties he is appointed by the standing joint committee of the county council and the quarter sessions (*u*) and may be dismissed by them (*a*)

In boroughs having a separate court of quarter sessions a clerk of the peace is appointed for the borough by the borough council (*b*), and he holds office during good behaviour (*c*)

**1321** In counties his salary is calculated and paid to him in his joint capacity as clerk of the peace and clerk to the county council (*d*). All fees and costs which are not excluded from this arrangement are payable to the county fund (*e*)

In boroughs he may be paid either by fees or by salary (*f*), but in practice he is almost invariably paid by salary and the fees authorised to be taken by the clerk of the peace are in that case to be accounted for by him to the borough treasurer (*g*)

**1322** The fees which the clerk of the peace is authorised to take are set out in a table settled in the counties by the justices at quarter sessions in the boroughs by the borough council and approved by the Secretary of State (*h*) and any clerk of the peace

SECT 7  
Officers of  
Quarter  
Sessions

(1) in  
counties

(11) in  
boroughs

Salary and  
fees

(1) in  
counties,

(11) in  
boroughs

Authorised  
fees

(*u*) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (2) As to the standing joint committee see title LOCAL GOVERNMENT p 370 *ante*. Formerly the appointment in the case of Lancashire was in the gift of the Chancellor of the Duchy (Lancaster County Clerk Act 1871 (34 & 35 Vict c 73) s 2). The clerk of the peace in Lancashire is now appointed as in other counties (Local Government Act 1888 (51 & 52 Vict c 41) s 83 (9)). The appointment might formerly be made by parol and without deed (*Saunders v Owen* (1695) 2 Salk 467) but is now by resolution of the standing joint committee.

(*a*) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (2). The grounds for dismissal are not now defined but under the former statute stat (1689) 1 Will & Mar c 21 refusal to record an order of the court of quarter sessions was held such a misdemeanour in the execution of his office as to warrant the dismissal of the clerk of the peace (*R v Russell* (1869) 10 B & S 91. *Wildes v Russell* (1866) L R 1 C P 722). Clerks of the peace appointed before 1888 may be dismissed by the justices in quarter sessions subject to appeal to the Lord Chancellor (Clerks of the Peace Removal Act 1864 (27 & 28 Vict c 65)). Complaint of the misconduct alleged must have been made in writing by two justices and a copy sent to the *custos rotulorum* (*ibid*).

(*b*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 164 (1)

(*c*) *Ibid* s 164 (2)

(*d*) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (5) As to his office as clerk to the county council see title LOCAL GOVERNMENT p 343 *ante*.

(*e*) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (*j*) As to the county fund see title LOCAL GOVERNMENT p 358 *ante*.

(*f*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 164 (5) Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 9

(*g*) Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 11. The method of accounting for them is to be such as the borough council may direct (*ibid*). As to the borough treasurer see title LOCAL GOVERNMENT p 313 *ante*.

(*h*) Clerks of the Peace (Fees) Act 1817 (57 Geo 3 c 91) s 2 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 30. Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 164 (5) (6). Copies of the table so approved are to be publicly displayed at the place where quarter sessions are held (*ibid* s 234, Clerks of the Peace (Fees) Act, 1817 (7 Geo 3, c 91), s 3).

**SECT 7**  
**Officers of**  
**Quarter**  
**Sessions**

Compensation  
for loss of fees

Deputies and  
assistants  
(1) in  
counties

(11) in  
boroughs

Disqualifica-  
tions

demanding or receiving any other or greater fee than that prescribed in the table of fees is liable to a penalty which may be recovered by any person bringing an action therefor in the High Court (i)

**1323** Compensation is granted to clerks of the peace for the loss of fees in criminal prosecutions in consequence of certain statutes and where the clerk of the peace is paid by salary the amount of the compensation is payable to the county or borough fund (k)

**1324** In counties the standing joint committee have power to appoint a deputy clerk of the peace to act in lieu of the clerk of the peace in case of his death illness or absence or in such other cases as they may determine (l) A deputy so appointed holds office during the pleasure of the standing joint committee and has all the powers of a clerk of the peace (m) A suitable remuneration may be assigned to him by the standing joint committee out of the salary of the clerk of the peace (n)

The effect of these enactments would seem to be that the clerk of the peace can no longer exercise his functions entirely by deputy (o) but he still retains the right to appoint an assistant to act whenever at a court of quarter sessions it is determined to form a second court (p)

In boroughs he is entitled in the case of his illness incapacity, or absence to appoint a deputy to act for him (q) but the appointment must be made by him in writing and notified in writing to the council in whose minutes the appointment must be recorded (r) In the event of his death or being incapable of appointing a deputy the council may appoint one and assign him a suitable remuneration out of the clerk's salary (s) A deputy has the same powers as the clerk of the peace (a)

Where a second court is formed at any quarter sessions the clerk of the peace must at the request of the recorder appoint an assistant clerk of the peace (b)

**1325** The clerk of the peace may not be a clerk to the justices

(i) Clerks of the Peace (Lees) Act 1817 (57 Geo 3 c 91) ss 2 4 Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 30 The penalty under the former Act is £5 under the latter £20

(k) Criminal Justice Act 1855 (18 & 19 Vict c 126) s 18

(l) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (4) Recorders Stipendiary Magistrates and Clerks of the Peace Act 1906 (6 Edw 7 c 46) ss 1 (1) (6) and see also title LOCAL GOVERNMENT p 344 ante Clerks of the peace appointed before 1888 retain their right to appoint their own deputy (Local Government Act 1888 (51 & 52 Vict c 41) s 118)

(m) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (4)

(n) Recorders Stipendiary Magistrates and Clerks of the Peace Act 1906 (6 Edw 7 c 46) s 1 (1)

(o) This right he had subject to the approval of the *custos rotulorum* under stat (1545) 37 Hen 8 c 1 s 1 which is not repealed

(p) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 11 see Local Government Act 1888 (51 & 52 Vict c 41) s 83 (4)

(q) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 164 (3)

(r) *Ibid* s 164 (4)

(s) Recorders Stipendiary Magistrates, and Clerks of the Peace Act 1906 (6 Edw 7 c 46) s 1 (1)

(a) *Ibid* s 1 (3) If the office becomes vacant the deputy may continue to act until it is filled, up to a maximum of six months (*ibid* s 1 (2))

(b) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 168 (5)

## PART XI—QUARTER OR GENERAL SESSIONS

### SECT 7 Officers of Quarter Sessions.

of any petty sessional division of the county or borough for which he is clerk of the peace (c)

Where he has to devote the whole of his time to his duties as clerk of the peace he is not eligible to serve in Parliament (d)

Conviction for corrupt practices at an election vacates the office of clerk of the peace and incapacitates the convicted person from holding office for seven years (e)

**1326** In counties which are divided and have more than one court of quarter sessions a clerk of the peace is appointed for each division (f) Clerks of the peace in divided counties

In counties which are divided into separate administrative counties but have only one court of quarter sessions the clerkship of the peace of each administrative county is a separate office but the offices may be held by the same person (g) Where they are held by different persons the justices in general sessions may appoint the clerk of the peace of either administrative county to be clerk of the peace of such sessions and may remove him and the salary to be paid to him is determined jointly by the standing joint committees of the administrative counties (h)

**1327** The clerk of the peace in counties (i) has charge of and is responsible for the records and documents of the county subject to the directions of the *custos rotulorum* the quarter sessions or the county council (l) General duties  
(i) in counties

In boroughs he is the custodian of the records of the court of quarter sessions of the borough but otherwise the charters deeds (ii) in boroughs

(c) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 7 see also p 551 *ante*

(d) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (13)

(e) Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict c 51) ss 6 64

(f) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (10) The counties affected are Yorkshire and Lincolnshire which are divided into ridings or parts Cambridgeshire part of which the Isle of Ely has a separate court of quarter sessions and Northamptonshire part of which the Soke of Peterborough has a separate court of quarter sessions see pp 537 *ante*

(g) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (7) The counties affected are Suffolk and Sussex

(h) *Ibid*

(i) He acts both as clerk to the county council and as clerk of the peace of the county see title LOCAL GOVERNMENT p 343 *ante* When acting in relation to any business of the county council or acting under the statutes relating to the registration of parliamentary voters, or to the deposit of plans or to jury lists or to any registration matters he does so under the direction of the council (Local Government Act 1888 (51 & 52 Vict c 41) s 83 (6)) The Acts relating to such matters are to be read as if the clerk of the county council were substituted for clerk of the peace (*ibid*)

(k) *Ibid* s 83 (3) This duty includes such documents as are directed to be deposited with him under the standing orders of either House of Parliament (Parliamentary Documents Deposit Act 1837 (7 Will 4 & 1 Vict c 83)) special Acts deposited under the Cemeteries Clauses Act 1847 (10 & 11 Vict c 65) s 66 the Commissioners Clauses Act 1847 (10 & 11 Vict c 16) s 110 the Companies Clauses Consolidation Act 1845 (8 & 9 Vict c 16) s 161 the Gasworks Clauses Act 1847 (10 & 11 Vict c 15) s 45 the Harbours Docks and Piers Clauses Act 1847 (10 & 11 Vict c 27) s 9 the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict c 18), s 150 the

SECT 7  
Officers of  
Quarter  
Sessions

Duties as to  
notices

Duties at  
sessions

Duties as  
taxing officer

records and documents of the borough are in the custody of the town clerk (*l*)

**1328** The clerk of the peace is the proper officer to receive notices of appeal to the court of quarter sessions (*m*) He also issues the notice convening the sessions (*n*) and furnishes the list of jurors required to be summoned (*o*)

When the court is held it is his duty to prepare the indictments to call over the panels of grand and petty jurors to swear the juries; receive the bills when found arraign the prisoners give them in charge of the jury which is to try them and receive the verdict (*p*)

He receives the fines imposed and enrolls recognisances estimated by the court of quarter sessions (*q*) or the coroner for the county or borough (*r*) and he receives monthly returns of the fines imposed by the justices in petty sessions (*a*)

**1329** He is the taxing officer of the court of quarter sessions with respect to taxing costs payable out of the county or borough funds (*b*) and when the amount payable is ascertained he delivers to the person to whom the court directs the costs to be paid an order upon the county or borough treasurer (*c*) On the hearing of appeals by the court of quarter sessions costs ordered by the court to be paid are paid over to the clerk of the peace (*d*)

He also acts as the taxing officer in the case of amounts payable out of local funds by the local authorities or guardians upon application being made to him by the local authority or board of guardians or overseers (*e*)

Markets and Fairs Clauses Act 1847 (10 & 11 Vict c 14) s 35 the Railways Clauses Consolidation Act 1845 (8 & 9 Vict c 20) s 162 the Towns Improvement Clauses Act 1847 (10 & 11 Vict c 34) s 214 and the Waterworks Clauses Act 1847 (10 & 11 Vict c 17) s 90 plans deposited under the Railways Clauses Consolidation Act 1845 (8 & 9 Vict c 20) s 9 and accounts deposited under the Cemeteries Clauses Act 1847 (10 & 11 Vict c 65) s 60 As to his duty to make parliamentary returns see title LOCAL GOVERNMENT p 343 *ante*

(*b*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 17 (3)

(*m*) Compare *R v Derbyshire Justices* (1852) 22 L J (M C) 31

(*n*) By advertisement in the local press

(*o*) See title JURIES Vol XVIII pp 233 *et seq* 236 *et seq* 266 69 In the event of maiden sessions he must notify the jurors and in the case of county quarter sessions all the clerks to the justices see *ibid* p 239 and p 620 *ante* If he has not summoned the jury himself he may direct the sheriff or under sheriff who has done so to send the notice (Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) s 1 (2))

(*p*) Archbold Practice of Quarter Sessions 6th ed 75

(*q*) Levv of Fines Act 1823 (4 Geo 4 c 37) Quarter Sessions Act 1849 (Barnes Act) (12 & 13 Vict c 45)

(*r*) Coroners Act 1887 (50 & 51 Vict c 71) s 19 (4)

(*a*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 31

(*b*) See p 629 *post*

(*c*) Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) s 2

(*d*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 27

(*e*) Poor Law Amendment Act 1844 (7 & 8 Vict c 101) s 39 Public Health Act 1875 (38 & 39 Vict c 55) s 249 and see title POOR LAW For such work he is entitled to remuneration at a rate fixed by the Master of the Crown Office and declared by the Local Government Board (*ibid*)

**1330** In the county of London the clerkship of the peace is a distinct office from that of clerk of the county council, and must be filled by a different person (*f*)

SECT 7  
Officers of  
Quarter  
Sessions

# SECT 8—Finances of Quarter Sessions

County of  
London

## SUB SECT 1—County Fund County Treasurer

**1331** In a county all costs incurred by the quarter sessions or the justices out of sessions and all costs incurred by any justice, police officer or constable in defending any legal proceedings brought against him in respect of any order made or act done by him in execution of his duty are payable out of the county fund (*g*) so far as the amount is sanctioned by the standing joint committee of the county council and of quarter sessions and is not otherwise provided for (*h*). The payment is made by the county treasurer on the order of the county council (*i*)

Expenses  
borne by  
county fund

The costs ordered to be paid in criminal cases to the prosecution or defence are payable out of the county fund and the payment is made by the county treasurer upon the order or certificate of the court of quarter sessions or the justices before whom the matter in respect of which they are payable was heard (*l*)

Costs in  
criminal  
cases

The county treasurer receives quarterly from the clerk of the peace and the clerks to justices an account of the fees taken by them and of fines received by them and unclaimed or not otherwise appropriated (*l*)

Fees and fines  
payable to  
fund

## SUB SECT 2—Borough Fund Borough Treasurer

**1332** In boroughs the borough fund bears the cost of the recorder (*m*) and the clerk of the peace (*n*) and of payments made by order of the court of quarter sessions (*o*) where there is such a court and of the clerk to justices (*a*) and payments made by

Cost of  
borough  
sessions

If the account is presented to the auditor without being taxed its reasonableness cannot afterwards be questioned (*R v Naption Warwickshire Overseers* (1856) 25 L J (Q B) 296 *R v Hunt* (1856) 6 E & B 408)

(*f*) Local Government Act 1888 (51 & 52 Vict c 41) s 83 (11) see title METROPOLIS

(*g*) As to this fund see generally title LOCAL GOVERNMENT p 358 *ante*

(*h*) Local Government Act 1888 (51 & 52 Vict c 41) s 66 As to what costs of quarter sessions and petty sessions include see *ibid* s 100 In the county of London the City of London is liable to contribute to the costs of sessions for the county (*ibid* s 41 (5))

(*i*) *Ibid* s 80 (2) (5) As to the county treasurer see title LOCAL GOVERNMENT p 344 *ante*

(*k*) Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) ss 1—3 and see title CRIMINAL LAW AND PROCEDURE Vol IX pp 445 *et seq*

(*l*) Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 11 Justices Clerks Act 1877 (40 & 41 Vict c 43) s 6 and see pp 616 625 *ante*

(*m*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 140 (1), (2) Sched V Part I As to the recorder see p 544 *ante*

(*n*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) Sched V Part II This is the case if the clerk of the peace is paid by salary in lieu of fees see p 625 *ante*

(*o*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 140 (3) (*o*)

(*a*) *Ibid*, s 140 (1) (2) Sched V Part I



**SECT 8**  
**Finances of Quarter Sessions**  
 Contributions to county sessions  
 order of a justice in pursuance of the Municipal Corporations Act, 1882 (b) where there is a separate commission of the peace (c)  
 County boroughs which have a separate court of quarter sessions do not contribute to the cost of the quarter sessions of the county in which they are situated (d) but all other boroughs, whether they have a separate court of quarter sessions or not, do contribute (e)

Costs in criminal cases  
**1333** Costs in criminal cases are payable out of the borough fund of a county borough but in the case of other boroughs out of the county fund of the county in which they are situated (f)

Fees and fines payable to fund.  
**1334** Penalties imposed by the borough justices or the borough quarter sessions which are unclaimed or not otherwise appropriated (g) and the fees payable to the clerk to the justices where there is a separate commission of the peace (h) or to the clerk of the peace if paid by salary where there is a separate court of quarter sessions (i) are payable to the borough fund  
 Such penalties and fees must be accounted for quarterly to the borough treasurer (k) by whom all payments to and out of the borough fund are made (l)

### SECT 9 —Duties of the Sheriff

To sheriff  
**1335** The sheriff (m) is the officer to whom the precept of the justices convening quarter sessions in counties is addressed (n)  
 He is in theory responsible for the proclamation of the sessions but this duty is in fact carried out by advertisement in the local press by the clerk of the peace (a)

- \* (b) 45 & 46 Vict c 50 s 140 (3) (d)
- \* (c) In such case the expenses of providing and maintaining a justices room may be payable out of the borough fund (*ibid* Sched V Part II)
- (d) Local Government Act 1888 (51 & 52 Vict c 41) s 32 (3)
- (e) *Ibid* s 35 (5) see note (f) p 540 *ante* and title LOCAL GOVERNMENT pp 353 *et seq ante*
- (f) Costs in Criminal Cases Act 1908 (8 Edw 7 c 15) s 2 and see title CRIMINAL LAW AND PROCEDURE Vol IX pp 445 *et seq*
- (g) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 221 This includes in the case of quarter sessions boroughs all fines except (a) such as are directed to be paid to the informer or persons aggrieved (b) such as are specially appropriated under any Act passed since 1835 (c) such as are payable to the revenue (*ibid* s 221 (2) Justices Clerks Act 1877 (40 & 41 Vict c 43) s 6)
- (h) Criminal Justice Administration Act 1851 (14 & 15 Vict c 5) s 11 Justices Clerks Act 1877 (40 & 41 Vict c 43) s 9
- (i) Criminal Justice Administration Act 1851 (14 & 15 Vict c 55) s 11
- (k) *Ibid* Justices Clerks Act 1877 (40 & 41 Vict c 43) s 9
- (l) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 142 As to the borough treasurer see title LOCAL GOVERNMENT p 313 *ante*
- (m) As to boroughs which have the right to appoint a sheriff see note (f) p 540 *ante* See generally title SHERIFFS AND BAILIFFS
- (n) See p 619 *ante*
- (a) See pp 619 628 *ante* In the same manner it is in theory his duty to be present at quarter sessions but in fact the under sheriff is usually present in his stead see title SHERIFFS AND BAILIFFS As to his duty

**1336** The sheriff is the officer through whom or through whose subordinates fines and forfeited recognisances are recovered the goods of defaulting persons distrained on or the persons themselves taken into custody (*b*)

SECT 9  
Duties of  
the Sheriff

#### SECT 10—*Duties of the Police*

**1337** In counties the police are under the control of the standing joint committee of the county council and quarter sessions (*c*) but it is still the duty of the chief constable in counties to attend the court of quarter sessions (*d*) and the justices at sessions may make such orders as they deem expedient with regard to the attendance of police upon them theret (*e*)

In counties

In boroughs as well as in counties the police perform such duties as quarter sessions may direct (*f*)

In general

#### SECT 11—*Juries*

**1338** Jurors for county quarter sessions are drawn from the jury list compiled by the clerk of the peace (*g*) He makes out a list of those to be summoned for any sessions and transmits it twenty days before the holding of the sessions to the sheriff by whom or by whose under sheriff the summons is actually issued (*h*)

County  
quarter  
sessions

Jurors in boroughs are summoned directly by the clerk of the peace (*i*)

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in summoning jurors see title JURIES Vol XVIII pp 236 238 and as to the notice required in the event of maiden sessions see *ibid* p 239 and p 620 *ante*

(*b*) Levy of Fines Act 1822 (3 Geo 4 c 46) Levy of Fines Act 1823 (4 Geo 4 c 37) Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 17 (Baines Act) As to his duties with regard to annual returns and as to the appointment of under sheriff and deputy see title SHERIFFS AND BAILEYS

(*c*) Local Government Act 1888 (51 & 52 Vict c 41) s 9 see title LOCAL GOVERNMENT p 370 *ante* and see generally title OFFICE

(*d*) County Police Act 1839 (2 & 3 Vict c 93) s 17

(*e*) County Police Act 1840 (3 & 4 Vict c 88) s 26

(*f*) County and Borough Police Act 1856 (19 & 20 Vict c 69) s 7 see the Local Government Act 1888 (51 & 52 Vict c 41) s 9

(*g*) Juries Act 1825 (6 Geo 4 c 50) s 12 Juries Act 1862 (25 & 26 Vict c 107) s 4 and see title JURIES Vol XVIII pp 233—235 236 238 239 266 and see *ibid* pp 229 *et seq* The clerk of the peace in performing this duty acts as clerk of the county council (Local Government Act 1888 (51 & 52 Vict c 41) s 83 (6)) As to notice in the event of maiden sessions see p 620 *ante*

(*h*) Juries Act 1825 (6 Geo 4 c 50) s 41 and see titles JURIES Vol XVIII p 236 SHERIFFS AND BAILEYS

(*i*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 186 (2) (3) and see title JURIES Vol XVIII p 239 As to notice in the event of maiden sessions see p 620 *ante*

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## Part XII—Jurisdiction of Quarter and General Sessions Procedure

### SECT 1

#### Original Criminal Jurisdiction

Original trial by indictment

Offences not triable

### SECT 1—Original Criminal Jurisdiction

#### SUB SECT 1—On Indictment

**1339** The original trial of prisoners by a court of quarter sessions is always begun by indictment (j) the course of the proceedings being in all respects similar to that of a trial by a court of assize (k)

**1340** All indictable offences may be tried by quarter sessions except those enumerated below (l)

1 Treason

2 Murder

3 Any felony the punishment of which may be penal servitude for life except burglary which is triable at quarter sessions unless there are circumstances making the case grave or difficult (m)

4 Misprision of treason

5 Offences against the title prerogative or person of the Sovereign or Government or against either House of Parliament

6 Offences subject to the penalties of *perjurium*

7 Blasphemy and offences against religion

8 Administering or taking unlawful oaths

9 Perjury and subornation of perjury (n)

10 Making or suborning any other person to make a false

(j) Formerly the trial might be begun either by indictment information or presentment but the proceeding by information has fallen into disuse and there is no real distinction between presentment and indictment as on a presentment being made an indictment is drawn to meet it by the clerk of the peace

(k) See title CRIMINAL LAW AND PROCEDURE Vol IX pp 329 *et seq* 351 *et seq* Quarter sessions have power as part of their inherent jurisdiction to order a convicted person to come up for judgment when called upon and therefore when such a person is bound over under a condition authorised by the Probation of Offenders Act 1907 (7 Edw 7 c 17) (see note (m) p 605 *ante*) and commits a breach of the recognisance quarter sessions have power to sentence him even if as seems probable the Act referred to does not apply except in the case of courts of summary jurisdiction (*R v Spratling* [1911] 1 K B 77 C C A)

(l) Justices in quarter sessions had at one time jurisdiction to try all offences but forgery or perjury but this jurisdiction has been from time to time limited The offences excepted from their jurisdiction were defined by the Quarter Sessions Act 1842 (5 & 6 Vict c 38) s 1 Those contained in the list given in the text *supra* are all enumerated by that Act except such as are specially noted Particulars as to the various offences will be found in title CRIMINAL LAW AND PROCEDURE Vol IX pp 450 *et seq*

(m) The exception in regard to burglary was made by the Burglary Act 1896 (59 & 60 Vict c 57) An attempt to commit suicide is not an attempt to commit murder, and not being within the Offences against the Person Act 1861 (24 & 25 Vict c 100) s 11 is not an offence withdrawn from the jurisdiction of quarter sessions (*R v Burgess* (1862) 32 L J (M C) 55 C C R)

(n) Perjury Act 1911 (1 & 2 Geo 5 c 6) s 10 Sched \* This Act does not come into force until 1st January 1912

oath, affirmation or declaration punishable as perjury or as a misdemeanour (o)

11 Forgery

12 Unlawfully or maliciously setting fire to crops or to any part of a wood or trees or to any heath, gorse, furze or fen

13 Bigamy and offences against the laws relating to marriage

14 Abduction of women and girls

15 Endeavouring to conceal the birth of a child

16 Composing, printing or publishing blasphemous, seditious, or defamatory libels

17 Unlawful combinations and conspiracies except those to commit any offence which the court might have tried if committed by one person

18 Stealing or fraudulently taking, injuring or destroying records or documents belonging to any court of law or relating to any proceeding therein

19 Stealing or fraudulently destroying or concealing wills or testamentary papers or any documents or written instrument being or containing evidence of title to any interest in land

20 False personation (p)

21 Bribery at elections and otherwise (q)

22 Poaching at night by three or more persons, one or more of whom is armed (r)

23 Offences indictable under the Criminal Law Amendment Act 1885 (s)

24 Offences by agents, bankers or factors under the Larceny Acts 1861 and 1901 (t)

25 Offences in regard to official secrets (u)

SPOT 1.  
Original  
Criminal  
Jurisdiction

#### SUB-SICTION—Articles of the Peace

**1341** Articles of the peace are an application to prevent an apprehended breach of the peace by ordering the offender to give security for his good behaviour and imprisoning him in default.

The complaint may be made or exhibited to the High Court or to a court of assize as well as to justices (a) and if made to justices

Definition  
Procedure

(o) See note (n) p. 632 *ante*

(p) False Personation Act 1874 (37 & 38 Vict. c. 36) s. 4

(q) Quarter Sessions Act 1842 (5 & 6 Vict. c. 38) s. 1. Corrupt Practices Prevention Act 1854 (17 & 18 Vict. c. 102) s. 10. Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51) s. 53. Municipal Elections (Corrupt and Illegal Practices) Act 1884 (47 & 48 Vict. c. 70) s. 30. City of London Ballot Act 1887 (50 & 51 Vict. c. xiii) s. 9. Local Government Act 1894 (56 & 57 Vict. c. 73) s. 48. London Government Act 1899 (62 & 63 Vict. c. 14) s. 2 (5). Prevention of Corruption Act 1906 (6 Edw. 7 c. 34) s. 2 (5). But prosecutions under the Public Bodies Corrupt Practices Act 1889 (52 & 53 Vict. c. 69) may be tried at quarter sessions (*ibid.* s. 6).

(r) Night Poaching Act 1828 (9 Geo. 4 c. 69) s. 9

(s) 48 & 49 Vict. c. 69 s. 17

(t) 24 & 25 Vict. c. 96 ss. 75—87. 1 Edw. 7 c. 10

(u) Official Secrets Act 1911 (1 & 2 Geo. 5 c. 28) s. 10 (3) see *ibid.* s. 13 (2)

(a) *R. v. Dunn* (1847) 12 Q. B. 1026. In the case of a peer or peeress the complaint must be made to the High Court (4 Bl. Com. 253, compare

SECT 1  
Original  
Criminal  
Jurisdiction

may be made to them either when assembled in quarter sessions or not the jurisdiction to deal with the complaint being derived from the terms of their commission (b) The complaint should usually be made locally and not to the High Court which has refused to hear such a complaint on the ground that it should have been made to the local quarter sessions (c) but if complaint has been received and sureties required on insufficient grounds or if the justices have refused to require sureties to be given the High Court has power to quash the order (d) or to require sureties to be given (e)

When not  
made at  
quarter  
sessions

**1342** A distinction is to be drawn between such complaints when made to justices at quarter sessions and at other times. When not made at quarter sessions they are not articles of the peace but are merely applications to have the defendant bound over to keep the peace and the procedure is then the same as in the case of any other complaint (f) both complainant and defendant being liable to be called examined and cross examined and made subject to costs (g)

When made  
at quarter  
sessions

**1343** Articles of the peace exhibited at quarter sessions are a complaint made *ex parte* (h) the defendant cannot be called nor make answer to the allegations against him by affidavit or otherwise (i)

Grounds for  
complaint

**1344** The complaint must be made upon oath (j) and show sufficient grounds for the application (l) The proper ground is that the complainant is in fear of bodily injury (l) but a libel likely to lead to a breach of the peace has been held sufficient ground (m) When satisfied that there is sufficient ground for the application it is the duty of the justices to grant it (n) but if the complaint appears

*Ex parte Clifford (Lord)* (1845) 1 New Spss (ns 490) The complaint to the High Court is made *ex parte* to the Divisional Court see Crown Office Rules 1906 rr 246—256

(b) See p 536 *ante* and stats (1360-1) 34 Idw 3 c 1 (1487) 3 Hen 7 c 2

(c) *R v Hault* (1759) 2 Burr 780

(d) *P v Dunn* (1840) 12 Ad & Ll 599 The court will not however interfere to reduce the amount of the security fixed by justices (*R v Holloway* (1834) 2 Dowl 525) or to question the decision of the justices as to the reasonableness of the apprehension felt by the complainant (*R v Irigarthen* (1833) 5 B & Ad 678) As to the powers of the High Court see further pp 661 666 *post*

(e) *R v Mallinson* (1851) 16 Q B 367

(f) As to such procedure see p 607 *ante*

(g) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 25 see p 603 *ante*

(h) *Vane s (Lord) Case* (1744) 13 East 172 n

(i) *Ibid R v Doherty* (1810) 13 East 171 *R v Dunn supra*  
*R v Mallinson supra R v Groves* (1863) 8 L T 311

(j) *R v Dunn supra*

(k) *Ex parte Hulse* (1851) 21 L J (M C) 21 *R v Mallinson supra*

(l) *Vane s (Lord) Case supra Phillips v Gateshead Justices* (1879) *Times* 15th July It is insufficient that the complainant should allege that if defendant were not bound over there would be a risk of his committing a breach of the peace himself (*ibid*)

(m) *Haylock v Sparke* (1853) 22 L J (M C) 67

(n) *Port v Hutton* (1876) 45 L J (M C) 95

to them malicious and untrue they may refuse process and commit the complainant for perjury (o)

SECT 1  
Original  
Criminal  
Jurisdiction

**1345** Justices are entitled to require security from the defendant for the keeping of the peace for any time they may think necessary (p) but not for an indefinite period (q) The taking of sureties and commitment to prison in default are judicial acts and cannot therefore be performed on Sunday (r)

Order of the  
court

#### SUB SECT 3—*Incorrigible Rogues*

**1346** The court of quarter sessions has jurisdiction in respect of incorrigible rogues committed by one or more justices to the house of correction until the next general or quarter sessions The persons included in this category are vagrants who after a previous conviction for vagrancy have been convicted a second time or who have been convicted of breaking or escaping out of prison or of violently resisting the police by whom they are arrested upon a charge of vagrancy on which they are convicted before a justice (s)

Jurisdiction

Person  
affected

The court may inquire into the circumstances of the case and in its discretion order the offender to be further imprisoned and kept to hard labour for any period not exceeding one year and if a male to be whipped (t)

Punishment

#### SECT 2—*Original Civil Jurisdiction*

**1347** The greater part of the civil jurisdiction of the court of quarter sessions which was mainly administrative has been transferred to the county council (a) and where a local Act is in existence under which powers similar to those transferred by statute are exercised by quarter sessions or a committee of quarter sessions such powers may be transferred by order of the Local Government Board (b) The matters still within the civil jurisdiction of quarter sessions are noticed below (c)

Matters not  
transferred to  
the county  
council

(o) *R v Parnell* (1759) 2 Burr 806 It is the duty of justices who are aware that a prize fight is to take place to cause the parties to be brought before them and bind them over till the next assizes or sessions (*R v Bullingham* (1825) 2 C & P 234)

(p) *R v Bowes* (1787) 1 term Rep 696 compare *R v Little Ex parte Wise* (1909) 101 L T 859

(q) *Pricket v Gratrex* (1846) 8 Q B 1020

(r) *R v Ramsay* (1867) 16 W R 191 see title FIMF

(s) Vagrancy Act 1824 (5 Geo 4 c 83) s 5 But the defendant must have been convicted as a rogue and vagabond A conviction for being idle and disorderly is insufficient (*R v Johnson* [1909] 1 K B 439) and see titles CRIMINAL LAW AND PROCEDURE Vol IX p 443 POOR LAW

(t) Vagrancy Act 1824 (5 Geo 4 c 83) s 10 and see title CRIMINAL LAW AND PROCEDURE pp 443 (appeals) 448 (costs) 537 (second offence of indecent exposure)

(a) Local Government Act 1888 (51 & 52 Vict c 41) ss 3 *et seq* see title LOCAL GOVERNMENT p 368 *ante* Where there is any dispute as to jurisdiction to be transferred the question is to be settled by the High Court (Local Government Act 1888 (51 & 52 Vict c 41) s 29) and there is no appeal from its decision to the Court of Appeal (*ibid Ex parte Kent County Council and Dover Council Ex parte Kent County Council and Sandwich Council* [1891] 1 Q B 725 C A)

(b) Local Government Act 1888 (51 & 52 Vict c 41) s 4

(c) See p 636 *post*

SPC 2  
Original  
Civil Juris-  
diction

Army Act  
1881

Clergy  
Discipline  
Act

(Constables for  
the parish

County Police

Coroners in  
boroughs

Fines and  
orders as to  
money

**1348** The court of quarter sessions is the authority empowered to order an increased rate to be paid for the employment of carriages and animals for military purposes (*d*)

**1349** Every three years the justices at county quarter sessions select five of their number as members of the list of assessors for the purpose of hearing certain cases in the Consistory Court (*e*)

**1350** The justices have power to pass a resolution if they think it necessary, for the appointment of one or more parish constables for any parish within their jurisdiction (*f*)

The control of county police is in the hands of the standing joint committee of the county council and quarter sessions but the justices in quarter sessions continue to have power to require constables to perform such police duties as they may think proper and maintain supervision of the force the members of which are bound to obey their lawful orders (*g*)

**1351** In boroughs having quarter sessions of their own the coroner appointed by the council receives his remuneration by order of the recorder who consequently has power to disallow fees in cases where he thinks that an inquest was unnecessary or was not duly taken (*h*)

**1352** The court of quarter sessions is responsible for the levy of all fines issues amerciaments forfeited recognisances or sums of money due in lieu or satisfaction of them (*i*) the roll of which is compiled (*j*) and sworn to by the clerk of the peace (*l*) before being placed in the hands of the sheriff and his officers to execute (*m*)

Fines etc. not accounted for as recovered by the sheriff or discharged are reinserted in the roll until they are recovered or until it has been ascertained to the satisfaction of the Commissioners of the Treasury that the party in default has not any goods or chattels in Great Britain on which distress can be levied and that the party in default himself cannot be found or placed in prison (*n*)

These provisions extend to the recovery of fines imposed by

(*d*) Army Act 1881 (44 & 45 Vict c 58) s 113 Sched III

(*e*) Clergy Discipline Act 1892 (55 & 56 Vict c 32) s 3 (1) (*c*) and see title ECCLESIASTICAL LAW Vol XI p 507, note (*f*)

(*f*) Parish Constables Act 1872 (35 & 36 Vict c 92) s 2 The list of persons eligible to serve as parish constables is made out by justices at special sessions see p 570 *ante* and see generally title POLICE

(*g*) Local Government Act 1888 (51 & 52 Vict c 41) ss 9 3C *Re Local Government Act 1888 Ex parte Leicestershire County Council and Standing Joint Committee of the County of Leicester* [1891] 1 Q B 53 and see titles LOCAL GOVERNMENT p 370 *ante* POLICE

(*h*) See title CORONERS Vol VIII, p 227 but as to the fees payable to the coroner under the Coroners Act 1887 (50 & 51 Vict c 71), s 27 (2), see title CORONERS, Vol VIII p 227

(*i*) Levy of Fines Act, 1822 (3 Geo 4 c 46) s 2

(*k*) *Ibid*

(*l*) *Ibid* s 3

(*m*) *Ibid* s 1

(*n*) Levy of Fines Act, 1823 (4 Geo 4, c 37) s 1

justices in a court of petty sessions or summary jurisdiction and notified to the clerk of the peace by the clerk to the justices (o)

The court is to make orders from time to time for the payment out of money taken from a prisoner arrested by the sheriff or his officers of such sums as may be necessary for the board or lodging for one night of such prisoner (p)

SECT 2  
Original  
Civil Juris-  
diction

**1353** Justices at quarter sessions have power to order a rateable reduction in the cost of the gas or water so as to reduce the profit of the gas or water company to the prescribed rate to make orders as to incidental costs and to inflict fines for refusal to produce books (q)

Gas and water  
rates

**1354** The justices have powers in connection with the improvement widening and diverting of highways and plans and certificates relating to such matters must be deposited with the clerk of the peace (a)

Highways

**1355** In counties and boroughs other than county boroughs the justices of the county in quarter sessions are the compensation authority (b)

Licensing

**1356** The justices of every county and quarter sessions borough appoint out of their number as many fit and proper persons as they consider necessary to act as the judicial authority for lunacy purposes (c) They also appoint three or more justices and one medical practitioner or more to act as visitors and the clerk of the peace or some other person to act as clerk to the visitors (d) They may make an order on the county or borough treasurer for the payment out of the county or borough fund of the salary and expenses of the visitors and their clerk (e)

Lunacy

In counties they are the licensing authority for houses for the reception of lunatics not in the jurisdiction of the Lunacy Commissioners and may in their discretion recommend to the Lord Chancellor that existing licences shall be revoked or not renewed (f)

(o) Quarter Sessions Act 1849 (Baines Act) (12 & 13 Vict c 4.) s 17 As to such fines see p 603 *ante*

(p) Sheriffs Act 1887 (50 & 51 Vict c 5.) s 14 (2) A copy of the order must be exhibited in some conspicuous place (*ibid* s 14 (3)) and see title SHERIFFS AND BAILIFFS Misconduct by a sheriff or his officer in execution of a writ issued by the court of quarter sessions may be dealt with by that court as if it were a contempt (Sheriffs Act 1887 (50 & 51 Vict c 5.) s 29 (3))

(q) See generally titles GAS Vol XV pp 367 368 WATER SUPPLY

(a) Highway Act 1835 (5 & 6 Will 4 c 50) ss 82—93 Highway Act 1864 (27 & 28 Vict c 101) ss 21 47 48 see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 76 *et seq*

(b) See title INTOXICATING LIQUORS Vol XVIII pp 68 69

(c) Lunacy Act 1890 (53 & 54 Vict c 5) s 10 and see title LUNATICS AND PERSONS OF UNSOUND MIND p 502 *ante*

(d) Lunacy Act 1890 (53 & 54 Vict c 5) ss 177 178 and see title LUNATICS AND PERSONS OF UNSOUND MIND p 468 *ante*

(e) Lunacy Act 1890 (53 & 54 Vict c 5) s 22

(f) *Ibid* ss 208 221 (1) In boroughs this jurisdiction is exercised by the justices in special sessions see p 570 *ante* and generally title LUNATICS AND PERSONS OF UNSOUND MIND, p 474 *ante*



- SECT 2**  
**Original**  
**Civil Juris**  
**diction**  
 Poor law
- 1357** Overseers and others who under an order of two justices, seize the goods of husbands and parents who leave their wives or children, for the maintenance of such wives and children are liable to account for the money so received by them to quarter sessions (*q*)  
 In counties the expenses of removal of a pauper in a parish which is not part of any union may be ordered by the justices in quarter sessions to be paid out of the county fund (*h*)  
 The justices in quarter sessions have also power to remove causes of complaint at a workhouse certified to them by justices who have visited the workhouse (*i*)
- 1358** In counties the justices in quarter sessions are the prison authority (*l*) and appoint the members of the visiting committee (*l*) and the officers of the prison (*m*)
- 1359** In both counties and boroughs the court of quarter sessions has authority to make an order for the delivery of wings bank effects in certain circumstances (*n*)
- 1360** The court of quarter sessions receives through the clerk of the peace and confirms the rules made by scientific and loan societies (*o*)

### SECT 3—Jurisdiction on Appeal

#### SUB SECT 1—In General

- General**  
**jurisdiction**
- 1361** The court of quarter sessions has jurisdiction in all cases where there is a right of appeal from a conviction or order except a separation order (*p*) made by a court of summary jurisdiction (*q*) or from the dismissal by such a court of an information under the Louse Management Acts 1827 and 1834 (*r*)

#### SUB SECT 2—In Particular Cases

- Jurisdiction**  
**in particular**  
**cases**
- 1362** The court of quarter sessions has also jurisdiction on
- 
- (*q*) Poor Relief (Deserted Wives and Children) Act 1718 (5 Geo 1 c 8) and see title POOR LAW  
 (*h*) Poor Removal Act 1845 (8 & 9 Vict c 117) s 5  
 (*i*) Workhouses Act 1790 (30 Geo 3 c 49) s 1  
 (*l*) Prison Act 1865 (28 & 29 Vict c 126) ss 5 6 Prison Act 1877 (40 & 41 Vict c 21) s 61 and see title PRISONS  
 (*l*) See *ibid*  
 (*m*) Prison Act 1865 (28 & 29 Vict c 126) s 10 In the City of London the prison authority is the Lord Mayor and Aldermen in other boroughs the borough justices at special sessions see title PRISONS  
 (*n*) Trustee Savings Banks Act 1863 (26 & 27 Vict c 87) s 13 As to such banks see title BANKERS AND BANKING Vol I pp 576 *et seq*  
 (*o*) Scientific Societies Act 1843 (6 & 7 Vict c 36) s 5 Loan Societies Act 1840 (3 & 4 Vict c 110) s 4 as to which see titles LITERARY AND SCIENTIFIC INSTITUTIONS p 207 *ante* and LOAN SOCIETIES p 219 *ante*  
 (*p*) The appeal from a court of summary jurisdiction granting or refusing a separation order is to a Divisional Court of the Probate Divorce and Admiralty Division of the High Court see title HUSBAND AND WIFE Vol XVI p 662  
 (*q*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 19 As to the conditions of the right of appeal see p 642 *post*  
 (*r*) 7 & 8 Geo 4, c 53 s 82 4 & 5 Will 4 c 51 s 23 see title REVENUE

appeal from rates and assessment to rates for relief of the poor (*s*) county (*t*) or borough (*a*) rates general district rates (*b*) and highway rates (*c*) from orders for the removal of paupers (*d*) orders relating to the settlement of pauper lunatics (*e*) and bastardy orders (*f*) and against appointments of overseers (*g*) orders and certificates of justices in regard to highways (*h*) and awards of inclosure commissioners (*i*) In counties it is the confirming authority in licensing matters (*l*)

SECT 5  
Jurisdiction  
on Appeal

#### SLCT 4—*Procedure*

**1363** The court of quarter sessions is opened by proclamation made by the clerk of the court Proclamation

In boroughs when the sessions are being held by a deputy for the recorder the formal appointment of the deputy is then read in open court (*l*)

(*s*) Poor Relief Act 1601 (43 Eliz c 2) s 2 Poor Relief Act 1743 (17 Geo 2 c 38) s 4 Poor Rate Act 1801 (41 Geo 3 c 2) ss 4 6 Scientific Societies Act 1843 (6 & 7 Vict c 6) s 6 Union Assessment Committee Act 1862 (25 & 26 Vict c 103) s 32—34 Union Assessment Committee Amendment Act 1864 (27 & 28 Vict c 39) s 1 see generally title RATES AND RATING

(*t*) County Rates Act 1852 (15 & 16 Vict c 81) s 21 see generally titles LOCAL GOVERNMENT p 359 *ante* RATES AND RATING

(*a*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 144 (10) see generally titles LOCAL GOVERNMENT p 320 *ante* RATES AND RATING

(*b*) Public Health Act 1875 (38 & 39 Vict c 55) s 269 see the Local Government Act 1894 (56 & 57 Vict c 73) and generally title RATES AND RATING

(*c*) Highway Act 1835 (5 & 6 Will 4 c 50) ss 106—108 Public Health Act 1875 (38 & 39 Vict c 55) s 269 see generally title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 171 172

(*d*) Poor Relief Act 1662 (14 Car 2 c 12) s 2 Poor Relief Act 1691 (3 Will & Mar c 11) ss 8 10 Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) s 79 Poor Law Procedure Act 1845 (11 & 12 Vict c 31) ss 4 *et seq* see generally title POOR LAW

(*e*) Lunacy Act 1890 (53 & 54 Vict c 5) s 503 see title LUNATICS AND PERSONS OF UNSOUND MIND p 497 *ante*

(*f*) Poor Law Amendment Act 1844 (7 & 8 Vict c 101) s 4 Bastardy Act 1845 (8 & 9 Vict c 10) s 6 see title BASTARDY Vol II p 433

(*g*) Poor Relief Act 1601 (43 Eliz c 2) s 1 but as to rural parishes see also Local Government Act 1894 (56 & 57 Vict c 73) ss 5 50 and as to overseers see generally titles LOCAL GOVERNMENT p 249 *ante* POOR LAW

(*h*) Highway Act 1835 (5 & 6 Will 4 c 50) ss 88 105 Highway Act 1864 (27 & 28 Vict c 101) ss 37—44 see generally title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 77 79 131 132

(*i*) Inclosure Act 1836 (6 & 7 Will 4 c 115) s 53 Inclosure Act 1845 (8 & 9 Vict c 115) ss 62 63 see title COMMONS AND RIGHTS OF COMMON Vol IV p 563

(*k*) See title INTOXICATING LIQUORS Vol XVIII pp 50 51

(*l*) Whether the appointment is made by the recorder himself under the Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 166 or the authority acting in his place under the Recorders Stipendiary Magistrates, and Clerks of the Peace Act, 1906 (6 Edw 7, c 46), s 1, see p 623, *ante*

**SECT. 4.**  
**Procedure**  
**The grand jury**  
**Duties**

**1364** The grand jury is then called and sworn by the clerk of the peace and afterwards charged by the chairman or deputy chairman of the court, or the recorder or deputy recorder as the case may be.

The duties of the grand jury are carried out in the same manner as in a court of assize except that indictments in respect of which they find a true bill are delivered to the clerk of the peace instead of the clerk of assize (*m*).

**Order of business**

**1365** The order in which business is dealt with by the court is in its discretion but it is usual to deal first with original civil business then with appeals and finally with the trial of prisoners upon indictment.

**Second court**

**1366** At any court of general or quarter sessions or adjourned quarter sessions the court may be divided and a second court formed whenever such a course seems advisable (*n*).

**In counties**

In a county such a court is formed by the appointment thereto of two or more justices by all the justices present at the meeting (*o*).

**In boroughs**

In a borough it is formed by the appointment of an assistant recorder by the recorder or his deputy (*p*).

In either case the clerk of the peace appoints an assistant clerk of the peace to be clerk of the second court (*q*).

**Adjournment**

**1367** At the end of each day of the sessions if the business is not completed the court must be formally adjourned. The adjournment is proclaimed by the clerk in the presence in counties of at least two justices (*r*) and in boroughs of the recorder or his deputy (*s*).

**For what time**

The sessions may be adjourned until the next day or to any day before that on which the next sessions are to be held (*a*), and the

(*m*) See title CRIMINAL LAW AND PROCEDURE Vol IX pp 345 *et seq*. The grand jury no longer makes a presentment upon any matter except those in respect of which an indictment will be drawn (Local Government Act 1888 (51 & 52 Vict c 41) s 78 (3)).

(*n*) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 9. In some counties if not as a rule in general the deputy chairman presides over the second court. The Quarter Sessions Act 1842 (5 & 6 Vict c 38) s 4 (now repealed) provided that on the formation of a second court the deputy chairman should be one of the officiating justices. There does not appear to be any statutory authority for or against the holding of a third court but the Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) seems to contemplate only a second court. (Note *per* Clerk of the Peace for Northumberland and of Berwick upon Tweed.)

(*o*) Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 9.

(*p*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 166 (1).

(*q*) *Ibid* s 166 (5). Stipendiary Magistrates Act 1858 (21 & 22 Vict c 73) s 11.

(*r*) *Re Bowman R v Middlesex Justices* (1834) 5 B & Ad 1113, see *R v Carmarthen Justices* (1821) 4 B & Ald 291.

(*s*) Municipal Corporations Act 1882 (45 & 46 Vict c 50) ss 165 166 see p 600. In the absence of the recorder or his deputy the mayor may adjourn the sessions see p 544, *ante*. The adjournment is noted in the minute book of the clerk of the peace.

(*a*) *St Michael & Costary Norwich v St Matthew s, Ipswich* (1729), 2 Stra. 831, *R v Fisher* (1730), 2 Stra. 865.

adjourned sitting may take place at the same place or, in counties, at any other place within the county (*b*)

SECT 4  
Procedure.

Whether adjourned or not the sessions are deemed to take place on one day only, the day on which they are opened (*c*), all business being dealt with in reference to that day (*d*)

**1368** If the sessions are not adjourned they are closed and business purporting to be transacted on a day subsequent to the opening day is not legally transacted if there is no adjournment (*e*) The justices may alter their decisions or orders at any time during the sessions (*f*) but not afterwards (*g*) and orders made at one sessions cannot be varied at subsequent sessions (*h*) Business how ever which is not finally determined may be adjourned to the next or a subsequent sessions whether merely for judgment or for the hearing of the case (*i*)

Effect of no  
adjournment

**1369** It is in the discretion of any court of quarter sessions to decide whether solicitors shall practise before them as advocates or not (*j*) but no solicitor in any event may so practise unless he has been admitted as a solicitor of the Supreme Court (*l*) nor if he or his partner is a justice of the county for which the court is held (*l*) In most cases it is the rule for barristers only to practise before courts of quarter sessions and an order of justices that in future barristers only should be heard provided that at least four attended has been upheld even though no barrister had previously attended the court except upon special retainer (*m*)

Right of  
audience

**1370** Counsel who commit contempt (*n*) of the court of quarter sessions are liable to punishment by that court even where

Contempt of  
court by  
counsel

- (*b*) *R v Hayward* (1837) 6 Ad & Fl 590 *R v Suffolk Justices* (1847) 4 Dow & L 628 see p 619 *ante*  
 (*c*) *H v Surrey Justices* (1813) 1 M & S 479  
 (*d*) *St Andrew s Holborn v St Clement s Danes* (1704) 2 Salk 494 606  
 (*e*) *R v Polsted (Inhabitants)* (1747) 2 Stra 1263 *R v Mullaney* (1833) 6 C & P 96  
 (*f*) *St Andrew s Holborn v St Clement s Danes supra R v Leicester shire Justices* (1813) 1 M & S 442  
 (*g*) *Cockfield (Inhabitants) v Bozstead (Inhabitants)* (1696) 2 Salk 477  
 (*h*) *R v Staffordshire Justices* (1857) 7 L & B 935  
 (*i*) *R v Wiltshire Justices* (1811) 13 East 352 *R v Kimbolton (Inhabitants)* (1837) 6 Ad & El 603 *Keen v R* (1847) 10 Q B 928 *R v Westmoreland Justices* (1868) 1 R 3 Q B 457 But where special business is required by statute to be transacted at a particular sessions it cannot be adjourned (*Bowman v Blyth* (1856) 7 E & B 26 and see *R v Belton* (1848) 11 Q B 379) and where the jurisdiction of quarter sessions in a matter existed under an Act of Parliament which was repealed before the holding of the sessions to which the matter was adjourned the jurisdiction failed with the repeal (*R v London (City) Justices* (1764) 3 Burr 1406)  
 \* (*j*) *Ex parte Evans* (1846) 9 Q B 279 *Collier v Hicks* (1831) 2 B & Ad 663 per Lord TENNENTEN C J at p 669  
 (*k*) Solicitors Act 1843 (6 & 7 Vict c 73) s 2 Judicature Act, 1873 (36 & 37 Vict c 66) s 87 see title SOLICITORS  
 (*l*) Justices of the Peace Act 1906 (6 Edw 7 c 16) s 3  
 (*m*) *Ex parte Evans* (1846) 9 Q B 279 and see titles BARRISTERS, Vol II pp 372 374 SOLICITORS  
 (*n*) See generally title CONTEMPT OF COURT ATTACHMENT AND COMMITTAL Vol VII pp 280 et seq 296.

- SECT 4**  
**Procedure**  
**Contempt in general**  
**Punishment**
- the contempt is committed in the course of the conduct of a case (o)**
- 1371** In matters of contempt generally the court of quarter sessions has as part of its jurisdiction an inherent power to punish persons for acts committed in the face of the court, but, if it exceeds its jurisdiction and proceeds unreasonably to treat as a contempt what is not so in fact, the High Court will restrain its action (p)
- 1372** The power is exercised by causing an officer of the court to take the offending party into custody and by the infliction of a fine or a term of imprisonment (q) The court it seems has no power to deal with contempt committed by one of its constituent members (r) Contempt of court not committed in court itself cannot be directly punished by quarter sessions The offender may however, be indicted for a misdemeanour at common law and punished by imprisonment or by a fine (s) and the High Court which has power to attach persons guilty of contempt of an inferior court always protects such a court from inroads upon its jurisdiction (t)

## Part XIII — Appeals from Courts of Summary Jurisdiction

### SECT 1—To Quarter Sessions

#### SUB SECT 1—Who may Appeal

- Right of appeal in special cases**  
**1373** The right of appeal from courts of summary jurisdiction to quarter sessions is the creation of statute and is provided for in many of the Acts which confer upon justices criminal civil, or administrative powers (u)
- General right of appeal**  
**1374** In addition to the right so given any person adjudged by the conviction or order of a court of summary jurisdiction to imprisonment without the option of a fine either as punishment for an offence or for failing to do or abstain from doing an act required to be done or left undone is entitled to appeal to quarter sessions whether the statute under which the conviction or order is made grants or withholds the right of appeal (a)
- Where right does not arise**  
This does not apply however, where the penalty is imposed in default of compliance with an order for the payment of money, the finding of securities the entering into a recognisance or the giving of security (b), nor where the person on whom the penalty is

(o) *Re Pater* (1864) 33 L J (M C) 142 and see titles BARRISTERS Vol II pp 385 386 CONTEMPT OF COURT ATTACHMENT AND COMMITTAL, Vol VII p 295 note (a)

(p) *Re Pater supra*

(q) See 2 Hawk P C c 1 s 15

(r) See 2 Hawk P C c 8 s 17

(s) Compare *R v Lefroy* (1873) L R 8 Q B 134 and see title CRIMINAL LAW PROCEDURE Vol IX p 461

(t) *R v P* [1903] 2 K B 432 *R v Davies* [1906] 1 K B 32.

(u) As to these special rights of appeal see p 650 *post*

(a) Summary Jurisdiction Act 1879 (42 & 43 Vict. c 49) s 19

(b) *Ibid*

imposed has pleaded guilty to an indictable offence for which he could be and has elected to be dealt with summarily (c)

SECT 1  
To Quarter  
Sessions

**1375** Persons sentenced by a metropolitan police magistrate to pay a fine exceeding £3 or to be imprisoned for more than one month are entitled to appeal to quarter sessions (d)

Appeal from  
sentence of  
metropolitan  
police  
magistrate  
Court to  
which appeal  
lies

SUB SECT 2—To what Court.

**1376** The appeal must be made to the prescribed court of general or quarter sessions or if no court is prescribed to the next practicable court of general or quarter sessions held for the area within which the court acted whose decision is appealed against (e). The next practicable court means one held not less than fifteen days after the day on which the decision appealed against was given (f).

SUB SECT 3—General Rules of Procedure.

**1377** Appeals from the convictions or orders of petty sessions and courts of summary jurisdiction acting in pursuance of the Summary Jurisdiction Acts are regulated by the rules laid down in these Acts (g), which are as follows —

Rules of  
procedure

**1378** Notice must be given by the appellant within seven days (h) of the date of the decision appealed against (i). It must be

Notice of  
appeal

(c) *R v London Justices Ex parte Lambert* [1892] 1 Q B 664 Where however a defendant while admitting the truth of a charge asks for the case to be heard on the ground that there are extenuating circumstances he is not debarred from the right of appeal (*R v Essex Justices Ex parte Stark* (1891) 61 L J (M C) 120 *R v Dickinson Ex parte Davis* [1910] 1 K B 469)

(d) Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) s 50

(e) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (1)

(f) *Ibid* ss 31 (1) 32 It would appear that in counties which have two distinct quarter sessions held by adjournment from one to the other the fifteen days must be calculated in either district from the first day of the sessions (*R v Sussex Justices* (1865) 34 L J (M C) 69)

(g) Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 6 Other appeals are regulated by the Quarter Sessions Act 1849 (Baines Act) (12 & 13 Vict c 45) as to which see pp 649 650 *post*. The summary jurisdiction rules do not apply to licensing appeals since the justices sitting in licensing matters are not a court of summary jurisdiction (*Boulter v Kent Justices* [1897] A C 556) and special rules are provided (see title INTOXICATING LIQUORS Vol XVIII pp 78 *et seq*) nor do the rules apply to appeals against poor law orders for removal which are excepted from the operation of the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) by *ibid* s 35 see title POOR LAW Orders in lunacy and bastardy cases are similarly excepted and special rules for appeals against orders for the maintenance of lunatics are provided by the Lunacy Act 1890 (53 & 54 Vict c 5) ss 301—313 see title LUNATICS AND PERSONS OF UNSOUND MIND p 494 *ante*. Bastardy orders are however expressly brought within the operation of the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) by *ibid* s 54, and the rules as to appeals therefrom apply see *R v Shingler* (1886) 17 Q B D 49 title BASTARDY Vol II p 453

(h) The provision contained in the Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 1 that fourteen days notice of appeal must be given does not apply to any appeal from a court of summary jurisdiction (Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 4 Sched.)

(i) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (2) Where the statute under which the decision is given prescribes a different

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Sessions

Recogni-  
sances

in writing signed by the appellant or his agent on his behalf (j), and must be served upon the other party and upon the clerk to the justices (k). It must contain the general grounds of the appeal (l).

**1379** Within three days after giving notice of appeal the appellant must enter into a recognisance before a court of summary jurisdiction to appear at the sessions to which he is appealing to prosecute the appeal to abide the judgment of the sessions, and to pay such costs as may be awarded thereat (m). The court of

time for notice the time so prescribed must be observed (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (2)). In *R v Glamorganshire Justices* (1889) 22 Q B D 628 the court was of opinion that although the statute under which that case was decided prescribed a shorter time within which notice was to be given notice given within seven days was sufficient the effect of the Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 6 being to provide for uniformity of procedure. Inasmuch as the provisions as to prescribed time are contained in the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) obedience to the conditions and regulations in which is enjoined by the Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 6 it is difficult to suppose that notice given within the prescribed time could be held to be insufficient and it is clear since the decision in *R v Glamorganshire Justices supra* that notice given within the seven days allowed by the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) would in all cases be held to be sufficient. For forms of notices of appeal to quarter sessions in rating appeals see *Encyclopædia of Forms and Precedents* Vol XI pp 215 *et seq*.

(j) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (7).

(k) *Ibid* s 31 (2). The notice need not be served personally (*P v Somersetshire Justices Ex parte Talbot* (1900) 69 L J (Q B) 311). It need not be in any special form and it may be sent by post as a registered letter and may be deemed to have been served at the time when it would be delivered in the ordinary course of the post (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (7) see *R v Essex Justices Ex parte Holmes* (1895) 11 F L R 187). It is insufficient to serve notice on the solicitor who represented the other party at the hearing for there is no reason to assume that the authority of the solicitor (see title SOLICITORS) is continued (*R v Oxfordshire Justices* [1893] 2 Q B 149 (C A)). In an appeal against a conviction under the Revenue Acts notice must be served on the officer who laid the information a notice served on a clerk in the office is insufficient (*R v Leves* (1870) 1 R 5 Exch 75). Where the other party consists of several joint owners service on one of them is sufficient (*R v Liverpool (Recorder)* (1861) 31 L J (M C) 127). Notice addressed to the clerk of the justices is sufficient notice to the justices (*R v Essex Justices* [1892] 1 Q B 490).

(l) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (2) compare *F v Oxfordshire Justices* (1823) 1 B & C 279. As to sufficiency of the grounds of appeal see p 646 *post* and see *Provincial Motor Cab Co v Dunning* [1909] 2 K B 599 where the form given in Oke's *Magisterial Formalist* 8th ed 53 was approved.

(m) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (3). Where the statute under which the decision is given prescribes a different time for entering into a recognisance the time as prescribed must be observed (*ibid*) see note (i) p 643 *ante*. In the case of an appeal by the owner of an animal from any conviction or order of a court of summary jurisdiction under the Protection of Animals Act 1911 (1 & 2 Geo 5 c 27) (this Act comes into force on 1st January 1912) the court may direct that the recognisance shall include an undertaking not to sell or part with the animal until the appeal is determined or abandoned and to produce it on the hearing of the appeal if such production is possible without cruelty (*ibid* s 14 (2)). As to recognisances generally, see p 607 *ante*. The court of summary jurisdiction before which this must be done is any such court whether in the place where the decision was given or not (*R v Durham Justices*, [1895] 1 Q B.

summary jurisdiction may require a surety or sureties to be found by the appellant or may permit him, instead of entering into a recognisance, to give such other security by deposit of money with their clerk or otherwise as they may deem sufficient (*n*)

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If he is in custody the court may if it thinks fit release him on his entering into the recognisance or giving the other security required (*o*)

**1380** Appeals must be entered at the office of the clerk of the peace (*p*) The practice with regard to the time for entering them varies at different sessions and such rules of practice as exist must be observed (*q*) but the sessions are not entitled to make any such rule as will amount to an additional condition of appeal (*r*) An appeal once entered must be heard at the sessions or at an adjournment thereof or must be respited until a subsequent court, otherwise the appeal is lost (*s*)

Entering the  
appeal

**1381** Where the proceedings appealed from were begun by an information or complaint the appeal does not necessarily lapse upon the death of the respondent (*t*) but it would seem to be otherwise in the case of the death of the appellant (*u*)

Effect of  
death of  
parties

801) provided that it has all the proper materials before it (*R v Durham Justices* [1895] 1 Q B 801 *per* WRIGHT J at p 805 and see *R v Anglesey Justices* [1892] 2 Q B 29) The recognisance must not be entered into before notice of appeal is given (*R v Cheshire Justices* (1896) 60 J I 585) and the justices before whom it is entered into should have the notice of appeal before them so as to be able to judge of the amount to be required (*R v Anglesey Justices supra*) A recognisance may be entered into by a director or member of a limited liability company on behalf of the company (*Southern Counties Deposit Bank Ltd v Boaler* (1895) 59 J P 536)

(*n*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (3) As to the duties of the clerk to the justices in recording such security see p 616 *ante*

(*o*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (4) In a case tried before the enactment of this provision the Court of Queen's Bench declined to order the release of an appellant on the ground that the right of appeal does not give a suspension of the execution (*Ex parte Wallmott* (1861) 30 L J (M C) 161)

(*p*) See p 628 *ante* The appellant's solicitor is liable personally for the fees payable to the clerk of the peace (*Langridge v Lynch* (1876) 34 L T 695) and see title SOLICITORS

(*q*) *R v Derbyshire Justices* (1852) 22 L J (M C) 31 It is customary for sessions to require appeals which are not to be respited (see p 646 *post*) but tried at that sessions to be entered before the beginning of sessions that the justices may know how much business there is to transact see *R v Pawlett* (1873) L R 8 Q B 491 Now that the holding of sessions may be dispensed with in the absence of business five days before the day fixed for their commencement (see Assizes and Quarter Sessions Act 1908 (8 Edw 7 c 41) and p 620 *ante*) it may be necessary in order to ensure the appeal being heard to enter it more than five days before the sessions If an appeal cannot be entered before the holding of sessions is in fact dispensed with the next sessions to be held for the same area are presumably the next practicable sessions (see p 643 *ante*)

(*r*) *R v Pawlett supra*

(*s*) *Anon* (1725) 1 Sess Cas (K B) 271 Archbold Practice of Quarter Sessions 6th ed 253 As to respiting appeals see p 646 *post*

(*t*) *R v Truelove* (1880) 5 Q B D 336

(*u*) See Archbold Practice of Quarter Sessions, 6th ed 254, n *Quere*,



## SECT 1

## To Quarter Sessions

## Respiteing appeals

## Effect of informality

## Procedure at hearing

**1382** The court of quarter sessions has power to respite the hearing of the appeal or to postpone the giving of its judgment to the next or a subsequent sessions (b)

The exercise of this power for the advancement or convenience of justice is in the absolute discretion of quarter sessions (c), unless by the statute under which the proceedings are held the hearing is expressly limited to one particular court (d)

**1383** The justices at quarter sessions are the judges subject to correction by rule by the High Court on a point of law (e) of the observance of their rules of practice the sufficiency of the notice given and the validity of the grounds of appeal stated (f) When the recognisances required are insufficiently entered into or are otherwise defective or invalid they may allow them to be amended on such terms as to time and costs as they may decide (g)

**1384** At the hearing of the appeal the conviction or order appealed against is read by the clerk of the peace (h) The appellant may then be called upon to prove service of notice of appeal (i) and objection may be taken to the grounds of appeal but no objection which is merely one of form will be allowed and in other cases the court has power to cause the ground of appeal to be amended (l)

however where in consequence of the decision appealed from the possession of property (which for example has been forfeited by the decision) is in dispute

(b) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (5) see p 641 *ante*

(c) *R v Walls Justices* (1811) 13 East 352 *R v Cambridge Union Guardians* (1861) 1 B & S 61 *R v Westmoreland Justices* (1868) 9 B & S 288

(d) *Bowman v Blyth* (1857) 7 E & B 47 Ex Ch and see *R v Belton* (1848) 11 Q B 379

(e) See pp 661 *et seq post*

(f) See note (k) *infra*

(g) Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 8

(h) Archbold Practice of Quarter Sessions 6th ed 257 As on appeals counsel as a rule appear for the appellant and respondent respectively the conviction appealed against is generally taken as read the original being in court in the charge of the clerk of the peace The conviction or order of the justices appealed against should be returned to the clerk of the peace by the clerk to the justices (Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 14) Should the return not be made in time before the appeal is to be heard the appellant might in certain circumstances be able to maintain an action against the justices (*Proser v Hyde* (1786) 1 Term Rep 414) but in that case it is presumed that he would have to prove that the omission was owing to malice and was without reasonable or probable cause (see Justices Protection Act 1848 (11 & 12 Vict c 44) s 1 and p 556 *ante* and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS) or to indict the justices for disobedience to the statute (see *Ex parte Hayward* (1863) 3 B & S 546) In the event of there appearing to be a variance between the conviction or order returned by the justices and the note of it supplied by the justices to the appellant at the time the appellant may apply for time to consider his position and for the adjournment of the trial for that purpose (*R v Allen* (1812) 15 East 333 340)

(i) Where the appellant had given two notices of appeal and had elected to proceed on the second which proved to be bad it was held that the first notice still remained available for him to proceed on (*R v Wolverhampton (Magistrates)* (1887), 35 W. R. 650)

(l) Quarter Sessions Act, 1849 (12 & 13 Vict c 45), s 3 The

Objection may also be taken at this stage to the form of conviction if bad upon the face of it, but such defect may, it seems, be amended by order of the court of quarter sessions (l)

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After such preliminary points are dealt with the hearing of the matter is proceeded with the party who began in the court below beginning again and proving his case *de novo* (m)

**1385** The appellant is within his right in calling any evidence in support of his appeal whether called by him in the court below or not. An objection to the reception of any such evidence will not be allowed unless the grounds of appeal appear to be so imperfectly or incorrectly set forth as not to enable the respondent to prepare for trial and even in such a case the court of quarter sessions has power to order the grounds of appeal to be amended upon such terms as to adjournment and costs as seem to it proper (n)

Evidence

**1386** At county quarter sessions the decision of the court is that of the majority of the justices hearing the matter

Decision of  
the court

The chairman of the court has no casting vote and therefore while the justices are equally divided the appeal must either be adjourned and reheard (o) or one of the justices in favour of the appeal must withdraw and the original decision be allowed to stand (p)

**1387** The court of quarter sessions has power to confirm reverse or modify the decision appealed against (q) or to remit the

Powers of the  
courts

grounds of appeal must not be so imperfectly or incorrectly set forth as to be insufficient to enable the respondent to inquire into the subject of the statement and prepare for trial (Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 3). Where the right of appeal is given to an aggrieved party the grounds of appeal must show that the appellant is aggrieved (*R v West Riding of Yorkshire Justices* (1828) 1 Man & Ry (K B) 547; *R v Blackawton (Inhabitants)* (1830) 8 L J (o s) (m c) 123) but it is otherwise where the appellant is appealing against a conviction or order made against himself (*R v Newcastle on Tyne Justices* (1831) 1 B & Ad 933) or where by statute the right of appeal is left open to any person (*R v Somersetshire Justices* (1828) 7 B & C 681 n)

(l) *R v Middlesex Justices* (1877) 2 Q B D 516

(m) *R v Newbury (Inhabitants)* (1791) 4 Term Rep 475. In practice this means that in appeals against convictions or orders made in proceedings begun by an information or complaint it is the respondent that begins except in revenue cases where there is an appeal from acquittal see p 638 ante. Where there is a rule of practice at sessions that the appellant in a rating appeal who disputes only the amount of the rate should begin the High Court will not interfere with the rule (*R v Suffolk Justices* (1817) 6 M & S 57)

(n) Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 3

(o) *Bagg v Colquhoun* [1904] 1 K B 554. That indeed has been assumed to be ordinarily the proper course (*Ex parte Evans* [1894] A C 16 per Lord Herschell, L C at p 19)

(p) Where it was necessary that an appeal should be decided at a particular meeting of sessions withdrawal of one of the justices in favour of the appeal was approved (*Ex parte Evans supra*). Where the justices refuse to adjourn the appeal must be dismissed (compare *R v Ashplant* (1888) 52 J P 474)

(q) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (5). Where on an appeal against a conviction the sentence imposed by the court of summary jurisdiction is modified by quarter sessions a fresh warrant of commitment is required, and an action may be maintained

**SMO 1**  
**To Quarter**  
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matter, with the opinion of that court on it, to a court of summary jurisdiction acting for the same area as the court whose decision was appealed against (*r*), or to make such other order in the matter as it may think just (*s*). In making any such order the court of quarter sessions may exercise any power which the court of summary jurisdiction might have exercised and the order has the same effect and may be enforced in the same manner as if it had been made by the court of summary jurisdiction (*t*).

**Indorsement**  
**of conviction**  
**or order**

**1388** Whenever a decision appealed against is not confirmed it is the duty of the clerk of the peace to indorse on the conviction or order appealed against a memorandum of the decision of quarter sessions and to send a similar memorandum to the clerk to the justices whose decision was appealed against, for entry in his register (*a*).

**Enforcement**  
**of order of**  
**court**

**1389** If the decision appealed against is confirmed any justice acting for the area in which the conviction or order was made may issue a warrant of commitment or distress in execution of it as if no appeal had been brought (*b*).

**Finality of**  
**order of court**

**1390** The decision of quarter sessions when given upon the merits is conclusive, and precludes the raising of the same matter again before a court of summary jurisdiction (*c*).

**Costs**

**1391** The court of quarter sessions has power to make any order in its discretion for payment of the costs by either side (*d*). If an appeal is not prosecuted they may be awarded to a respondent who has received notice of appeal (*e*) and if in his notice of appeal, the appellant has included grounds which in the opinion of the court are frivolous or vexatious the whole or any part of the costs incurred by the respondent in disputing such grounds may be

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against the governor of a prison who detains a person without such fresh warrant (*Demer v Cook* (1903) 88 L J 629). As to the issue of such warrants see title CRIMINAL LAW AND PROCEDURE Vol IX p 322 note (*o*).

(*r*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (5). The case need not be remitted to the same court of summary jurisdiction as heard it before unless as in bastardy proceedings the summons must be heard in a particular petty sessional division see p 566 *ante*.

(*s*) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (5).

(*t*) *Ibid*.

(*a*) *Ibid* s 31 (6). The memorandum must be embodied in any copy or certificate made at any subsequent time of the conviction or order and may be received as evidence in the same manner as the rest of the copy or certificate (*ibid*).

(*b*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 27. As to the issue of warrants of distress see p 604 *ante*.

(*c*) *E v Glynn* (1871) L R 7 Q B 16. *E v May* (1880) 5 Q B D 382.

(*d*) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 27. Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31 (5) see the Quarter Sessions Act 1849 (12 & 13 Vict c 45) ss 3 5. Costs however cannot be given against the Crown in excise cases where the Crown is not named (*R v Beadle* (1857) 7 E & B 492 and see *Moore v Smith* (1859) 28 L J (N S) 126).

(*e*) Quarter Sessions Act 1849 (12 & 13 Vict c 45), s 6.

awarded to him (f) Costs may also be awarded in cases where an appeal is dismissed for want of jurisdiction (g) The order to pay costs must state within what time they are to be paid, and direct them to be paid to the clerk of the peace and by him to the party entitled to them (h) If they are not paid within the required time, and the party ordered to pay them is not under a recognisance to do so the party entitled to them or any person on his behalf may obtain a certificate from the clerk of the peace upon production of which any justice acting for the area in which judgment was obtained may issue a warrant of distress (i)

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To Quarter  
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#### SUB SECT 4—Reference to Arbitration

**1392** In the case of appeals which are not against a conviction by a court of summary jurisdiction nor against orders in bastardy nor in revenue proceedings the matter may be referred to arbitration either upon application made by the parties to the High Court and an order of that court or by order of the court of quarter sessions made with the consent of the parties (h) Costs may be awarded in either case and the order of quarter sessions may include power to the arbitrator to grant them (l)

Reference to  
arbitration

(f) Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 4

(g) *R v Padwick* (1858) 8 E & B 704

(h) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 27 see Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 5 The powers under the latter Act to order one party to pay costs to the other does not abolish the intervention of the clerk of the peace (*Gay v Matthews* (1863) 4 B & S 425 440 Ex Ch)

(i) Summary Jurisdiction Act 1848 (11 & 12 Vict c 43) s 27 As to the issue of such warrants see p 604 *ante* and title CRIMINAL LAW AND PROCEDURE Vol IX p 322 note (o)

(k) Quarter Sessions Act 1849 (12 & 13 Vict c 45) ss 12 13 If the arbitration is ordered by the High Court upon the application of the parties they must bind themselves to submit to the award The procedure to be followed at the arbitration is that prescribed by the Arbitration Act 1889 (52 & 53 Vict c 49) (see title ARBITRATION Vol I pp 438 *et seq*) If the arbitration is ordered by quarter sessions that court settles the terms upon which it takes place but the order may upon the application of either party be made a rule of the High Court (Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 13) In either case the award is as binding and effectual as if it were the judgment of quarter sessions and may be enrolled on the application of either party in its records but in the latter case such enrolment must take place at the next sessions or next but one after the publication of the award or the order if any of the High Court setting it aside otherwise on the application of either party in the next term after publication of the award the High Court may refer the matter back to the arbitrator or set the award aside and order the quarter sessions to enter continuances and hear the appeal As to the application of the Arbitration Act 1889 (52 & 53 Vict c 49) to such proceedings see title ARBITRATION Vol I pp 492 493 and see *ibid* pp 439 note (o) 446 447

(l) If the arbitrator is to have power to award costs the order of reference must include the power (*West London Rail Co v Fulham* (1870) L R 5 Q B 361) Where the arbitrator has power given him the costs may be taxed after the close of the sessions (*Southampton Gas Co v Southampton Guardians* (1877) 2 Q B D 371) Otherwise an order made by sessions as to costs in a matter referred to an arbitrator must be made at the sessions at which the award is made (*R v Middlesex Justices* (1871) L R 6 Q B 220)

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To Quarter  
Sessions

Special  
procedure

SUB-SECT 5 — Procedure in Particular Cases

**1393** The number of statutes under which the right of appeal to quarter sessions is expressly given is very large, and reference must be made to the titles (*m*) under which they are dealt with for the peculiarities of procedure which exist in many particular cases

Appeals against the decisions of justices in licensing (*n*), pauper removal (*o*) and pauper lunatic (*p*) matters are not governed by the Summary Jurisdiction Rules, but by the provisions of the statutes passed in regard to them

Appeals against the decisions of justices sitting in special sessions (*q*) and rating appeals other than appeals from the decisions of justices at special sessions are also regulated by the statutes creating the right of appeal (*r*). In all these cases however regard must be paid to the provisions of the Quarter Sessions Act 1849 (*s*) and in particular fourteen clear days notice of appeal must be given in all appeals against rates (*t*)

SECT 2 — Appeals to the High Court

When the  
right of  
appeal exists

**1394** The right of appeal to the High Court by special case is given by statute (*u*) to any person who is aggrieved by a conviction,

(*m*) See titles *passim*

(*n*) See generally title INTOXICATING LIQUORS Vol XVIII pp 81 82

(*o*) See the Poor Relief Act 1662 (14 Car 2 c 12) s 2 Poor Relief Act 1691 (3 Will & Mar c 11) s 2 stat (1697) 8 & 9 Will 3 c 30 ss 3 6 Poor Relief Act 1722 (9 Geo 1 c 7) s 8 Poor Law Amendment Act 1834 (4 & 5 Will 4 c 76) ss 81 *et seq* Poor Law Procedure Act 1848 (11 & 12 Vict c 31) Union Chargeability Act 1865 (28 & 29 Vict c 79) and titles POOR LAW RATES AND RATING

(*p*) See Lunacy Act 1890 (53 & 54 Vict c 5) ss 301—313 and generally title LUNATICS AND PERSONS OF UN SOUND MIND p 494 *ante*

(*q*) As to special sessions see p 568 *ante* see also the Parochial Assessments Act 1836 (6 & 7 Will 4 c 96) s 6 (for which see title RATES AND RATING) Highway Act 1835 (5 & 6 Will 4 c 50) s 105 (for which see title HIGHWAYS STREETS AND BRIDGES Vol XVI pp 168 171)

(*r*) County Rates Act 1852 (15 & 16 Vict c 81) ss 17 22 *et seq* Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 144 Public Health Act 1875 (38 & 39 Vict c 55) s 269 Highway Act 1835 (5 & 6 Will 4 c 50) s 105 Highway Act 1864 (27 & 28 Vict c 101) s 37 Poor Relief Act 1601 (43 Eliz c 2) s 6 Poor Relief Act 1743 (17 Geo 2 c 38) ss 4 *et seq* Poor Rate Act 1801 (41 Geo 3 c 23) Union Assessment Committee Act 1862 (25 & 26 Vict c 103) s 32 Union Assessment Committee Amendment Act 1864 (27 & 28 Vict c 39) see generally titles HIGHWAYS STREETS AND BRIDGES Vol XVI pp 171 172 POOR LAW RATES AND RATING

(*s*) Quarter Sessions Act 1849 (12 & 13 Vict c 45)

(*t*) *Ibid* s 1 see title RATES AND RATING

(*u*) The statutes giving the right are the Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) and the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49). The latter Act (*ibid* s 33) incorporates the former Act as far as it is applicable and the procedure by special case is now regulated by these two statutes combined and by the Rule dated 20th March 1906 made in substitution for the Summary Jurisdiction Rules 1886 r 18 (Statutory Rules and Orders (Summary Proceedings) England 1906 p 599). In cases where the provisions of the two Acts are inconsistent those of the latter Act must be observed (*Stokes v Mitcheson* [1902] 1 K B 857). Even where justices purport to have stated a case under the former statute alone they may be taken to have stated it in the exercise of all their powers, including those conferred by the Summary Jurisdiction Act, 1879

## PART XIII—APPEALS FROM COURTS OF SUMMARY JURISDICTION.

order, determination, or other proceeding of a court of summary jurisdiction (v) on the ground that it is erroneous in point of law or is in excess of jurisdiction (a)

The person claiming to be aggrieved must be a person whose legal rights are directly affected by the justices action (b)

**1395** If a person entitled by law to appeal against the decision of justices to quarter sessions chooses to appeal by way of special case to the High Court he thereby abandons his right of appeal to quarter sessions finally and conclusively and to all intents and purposes (c)

**1396** If the justices consider that the application for a case to be stated is merely frivolous they may refuse it but not otherwise (d) and they must on the request of the appellant sign and deliver to him a certificate of their refusal (e) Where they have refused the High Court upon the application of the person aggrieved may

**§ 139, 2**  
**Appeals to the High Court.**

Person aggrieved  
Appellant loses right of appeal to quarter sessions  
Duty of justices to state a case

(42 & 43 Vict c 49) (*Rochdale Building Society v Rochdale Corporation* (1886) 51 J P 154)

(v) As to when justices are sitting as a court of summary jurisdiction see pp 567 568 *ante* Justices sitting in licensing sessions are not a court of summary jurisdiction (*Boulter v Kent Justices* [1897] A C 556) and have therefore no power to state a case nor have they such power when sitting in special sessions for any other purpose as for instance when sitting to revise jury lists (*Hagmayer v Willesden Overseers* [1904] 2 K B 316) or when sitting in special sessions for hearing appeals against poor rates (*Wheeler v Birmingham Overseers* (1860) 29 I J (M C) 175) or when exercising special powers under the Lunacy Acts (*Re Bethel's Application* (1899) 80 L T 492) or when holding an inquiry into an indictable offence which they have no power to deal with summarily (*Foss v Best* [1906] 2 K B 105 *per* CHANNELL J at p 110) On the other hand it has been held that justices sitting not under the Summary Jurisdiction Acts but under a private Act could state a case (*Leicester Borough Freeman (Deputies) v Iewitt* (1893) 68 L T 201) Under the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict c 39) s 11 justices have no power to state a case (*Manders v Manders* [1897] 1 Q B 474) and where justices have refused to enforce a highway rate the proper method of proceeding is not by special case (*Walker v Great Western Rail Co* (1859) 29 I J (M C) 107) and see title RATES AND RATING

(a) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 33 Under the Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) an aggrieved party could only apply for a special case upon a point of law after the hearing and determination of an information or complaint but see note (v) *supra* A provision in a statute passed before the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) came into operation declaring the decision of justices to be final was held not to be a bar to the stating of a case under *ibid* s 33 (*R v Bridge* (1890) 24 Q B D 609) but a similar provision in a statute passed since that Act came into operation precludes the stating of a case (*Westminster Corporation v Gordon Hotels Ltd* [1907] 2 K B 910) unless perhaps in the event of the justices giving their decision subject to a case for the opinion of the High Court (*ibid per* BUCKLEY L J at p 915)

(b) *Drapers Co v Haddon* (1892) 9 T L R 36

(c) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 14

(d) *Ibid* s 4 If no case can they refuse the application of the Attorney General (*ibid*) But where a magistrate refused to allow proceedings against a defendant to be withdrawn unless the defendant entered into a recognisance which he declined to do, it was held that the magistrate could properly refuse to state a case if he exercised his discretion on good grounds (*R v Little Ex parte Wise* (1909) 74 J P 7)

(e) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 4 The certificate should state that the application was merely frivolous.

**SECT 2**  
**Appeals to**  
**the High**  
**Court.**

issue a rule calling upon them and upon the respondent to show cause why they should not state a case (*f*) But justices cannot be compelled to state a case, and if stated the High Court will not entertain it, where the only issue is one of fact (*g*) Where justices have declined to hear a matter for want of jurisdiction they cannot state a case upon it (*h*) but it is otherwise if, having heard the matter, they then decline jurisdiction to determine it (*i*)

**Procedure**  
**application to**  
**justices**

**1397** The course of procedure to be observed on applying for a special case to be stated is as follows—the aggrieved party must apply to the court of summary jurisdiction whose proceedings are complained of within seven days from the date of the proceedings (*k*) The application must be made in writing and be left with the clerk of the court together with copies of it for the justices who constituted the court (*l*)

**Recogni**  
**sances**

**1398** The applicant is required to enter into a recognisance with or without sureties, for such a sum as the justice or justices to whom he applies or some other justices exercising the same jurisdiction may deem meet before the case is delivered to him to prosecute his appeal without delay to submit to the judgment of the court appealed to and to pay the costs if any awarded by such court (*m*) He must pay to the clerk of the court of summary jurisdiction the fees to which the clerk is entitled (*n*) He will

(*f*) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 5 Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 33 As to the proceedings on the application for a rule see title CROWN PRACTICE Vol X pp 110 *et seq*

(*g*) *R v Leomans* (1860) 24 J P 149 *Dyer v Parl* (1874) 38 J P 294 *Re Basingstole School* (1877) 41 J P 118

(*h*) *R v West Riding of Yorkshire Justices* (1866) 6 B & S 802

(*i*) *Muir v Hore* (1877) 47 L J (M C) 17

(*k*) Rule dated 20th March 1906 made in substitution for the Summary Jurisdiction Rules 1886 r 18 see note (*u*) p 650 *ante* This rule supersedes the provision of the Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 2 which prescribes an interval of three days only The seven days must however be seven clear days Sunday even if the last of the prescribed days must be reckoned is one of them (*Jacobs v R* (1858) 4 C B (N S) 264 *Wynne v Ronaldson* (1865) 12 L T 711)

(*l*) Rule dated 20th March 1906 made in substitution for the Summary Jurisdiction Rules 1886 r 18 see note (*u*) p 650 *ante* A written application must be served upon the justices (*South Staffordshire Waterworks Co v Stone* (1887) 19 Q B D 168 *Lochart v St Albans Corporation* (1888) 21 Q B D 188 C A) and this must include all the justices composing the court whose decision is complained of (*Westmore v Pain* [1891] 1 Q B 482) The copy to be left with the clerk must also be left within seven days (*h v Knull* (1893) 57 J P 277) and see note (*k*) *supra* It is now the duty of the clerk of the justices to forward to the justices the copies of the application left with him for them (Rule dated 20th March 1906 *supra*) But where an applicant served each of the justices personally with the copy and left with the assistant clerk to the justices another copy addressed to the clerk to the justices it was held that the rule had been sufficiently complied with (*R v Woodcock* [1907] 2 K B 104)

(*m*) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 3

(*n*) *Ibid* As to these fees see pp 613 614 *ante* and Justices Clerks Act 1877 (40 & 41 Vict c 43) s 8 Where the recognisance is not entered into until after the case is delivered the High Court cannot entertain the case (*Walker v Delacombe* (1894), 63 L J (M C) 77)

then if in custody be liberated upon his recognisance to appear before the same justice or justices, or other justice exercising the same jurisdiction, within ten days after the judgment of the High Court is given unless the decision appealed against is reversed (o)

If the conditions of the recognisance are not complied with the justices may indorse particulars of the default upon it, and forward it to the clerk of the peace for the area within which they exercise jurisdiction to be enforced in the usual manner (p)

**1399** When justices grant a special case it should be stated within three calendar months after the date of the application (q) and the applicant on receiving the case from the justices must transmit it to the High Court within three days (r), after first giving notice of appeal to the other party (s)

SECT 2  
Appeals to  
the High  
Court

Discharge  
from custody

Limitation of  
time

(o) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 3

(p) *Ibid* s 13 As to the manner of enforcing recognisances see pp 607 608 *ante*

(q) Rule dated 20th March 1906 made in substitution for the Summary Jurisdiction Rules 1886 r 18 see note (v) p 650 *ante* This rule has been held to be directory and not a condition precedent so that where through no fault of the applicant the case was not delivered within three months the High Court held that it had jurisdiction to entertain it (*Hughes v Warentree Local Board* (1894) 10 1 L R 357)

(r) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 2 The performance of this duty is a condition precedent in default of which without compelling circumstances the High Court cannot hear the case (*Woodhouse v Woods* (1859) 29 L J (M C) 149 *Morgan v Edwards* (1860) 29 L J (M C) 108 *Re Ban/s v Goodwin* (1863) 3 B & S 548 *Great Northern Committee v Inett* (1877) 2 Q B D 284) Sunday is not excluded in calculating these three days (*Aspinall v Sutton* [1894] 2 Q B 349) and delay caused by sending the case back to the clerk to the justices for correction is no excuse (*Gloucester Local Board of Health v Chandler* (1863) 32 L J (M C) 66) But where the courts are closed delay in transmission may be excused Thus a case received on Good Friday and transmitted on Wednesday when the courts reopened was held to have been duly transmitted (*Mayer v Harding* (1867) L R 2 Q B 410) and unavoidable delay in the course of transmission as for instance by the post might be excused (compare *Re Ban/s v Goodwin supra per BLACKBURN J* at p 555) but not so where the delay in transmission is caused by the neglect of a London agent of the appellant's solicitor (*Pennell v Uxbridge Churchwardens* (1862) 31 L J (M C) 92) Where a case which has not been transmitted within the required time has been set down for hearing by the appellant costs will be given against him (*Great Northern Committee v Inett supra*)

(s) This also is a condition precedent in default of compliance with which the High Court has no jurisdiction to hear the case (*Edwards v Roberts* [1891] 1 Q B 302 *Foss v Best* [1906] 2 K B 105) Where the respondent cannot be found after every effort to find him has been tried service upon the solicitor who represented him before the justices will be deemed sufficient (*Syred v Carruthers* (1858) E B & E 469 *Gloucester Local Board of Health v Chandler* (1863) 32 L J (M C) 66) and this was so held where the solicitor had ceased to act for the respondent the latter being served with the notice at a date long subsequent (*Anderson v Reid* (1902) 86 L T 713) See also *Teddington Urban District Council v Fife* (1906) 70 J P 381 where the court was satisfied that every effort had been made to serve the respondent with notice and that he actually knew of the appeal but notice given to the respondent's solicitors without an effort to serve the respondent himself even where the solicitors expressly accept service on his behalf is insufficient (*Rust v St Botolph Bishopsgate Churchwardens etc*) (1906) 94 L T 575) Notice given within the three days, but not till after the case is transmitted to the High Court is given too late (*Ashdown*



SECT 2  
Appeals to  
the High  
Court

Form of  
special case

**1400** The special case (t) should contain all the points which it is desired to raise, since the High Court will not hear argument on any point not raised before the justices (a), unless, indeed, it arises upon the face of the facts as stated (b), nor will it admit doubts as to the accuracy of the case unless there is a patent defect in it (c)

The usual practice is for the case to be drafted by the party applying for it and after it has been considered by the respondent for its terms to be finally settled by the justices by whom the case was heard

The case must be signed by all the justices who heard the matter whether they agreed with the decision given or not (d), and in the case of justices who cannot be communicated with in time to obtain their signatures within three months an extension of time will be granted (e)

The case must be divided into numbered paragraphs each dealing with distinct portions of the subject (f) and copies must be provided for the use of the judges at least two days before the day appointed for hearing (g) The court has power to send a case back to the justices to be amended (h)

Entering the  
special case

**1401** Special cases are to be entered at the Crown Office for hearing at the request of either party, eight clear days before the day on which they are set down for argument and notice thereof is to be given forthwith to the other party (i)

v *Curtis* (1862) 31 L J (M C) 216 *Edwards v Roberts* [1891] 1 Q B 302 Where an appellant merely sent to the respondent a copy of his application to the justices for a case and a copy of the case stated the notice so given was held sufficient (*Dickson v Mayes* [1910] 1 K B 452)

(t) Cases stated in criminal matters are regulated by the Crown Office Rules 1906 (Statutory Rules and Orders 1906 pp 605 *et seq*) and in other matters by R S C Ord 34 see Crown Office Rules r 129

(a) *Purkis v Huxtable* (1859) 1 E & E 780 *Motteram v Eastern Counties Rail Co* (1869) 7 C B (N S) 58 *Marshall v Smith* (1873) L R 8 C P 416

(b) *Ex parte Markham* (1869) 21 L T 748 *Knight v Hallwell* (1874) L R 9 Q B 412

(c) *Musther v Musther* (1894) 58 J P 53

(d) *Barker v Hodgson* (1904) 68 J P 310

(e) *Nantyglo Urban District Council v Ebly* (1905) 69 J P (Journal) 40 But a case may be verbally stated by one of the justices who heard it only the other justices having died in the interval (*Kean v Robinson* [1910] 2 I R 306)

(f) Crown Office Rules 1906 r 131 (Statutory Rules and Orders 1906 pp 605 *et seq*) The costs of drawing and copying any case where this rule is not observed will not be allowed by the taxing officer without the special order of the court (*ibid*)

(g) *Ibid* r 132 A complete set of papers must be provided for each judge (*ibid*) If the appellant does not deliver copies of the special case the respondent may do so and the appellant will not be heard till he has paid for them or deposited at the Crown Office a sum sufficient to do so If neither party delivers the required papers the case will be struck out unless otherwise ordered (*ibid* r 135)

(h) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 7 This power may be exercised before the case is argued (*Yorkshire Tire and Axle Co v Rotherham Board of Health* (1858) 4 C B (N S) 362) Where a case is sent back for amendment judgment will be delivered on the case being returned amended (Summary Jurisdiction Act 1857 (20 & 21 Vict. c 43) s. 7) Where, after being sent back for amendment, the case is abandoned by the appellant the court may order him to pay the respondent's costs (*Crowther v Bowll* (1884) 13 Q B D 680)

(i) Crown Office Rules, 1906, r 130 This rule does not dispense with

**1402** On the hearing of a special case justices, where not made parties to the case have no right to appear (j) and are not liable to costs in respect of or by reason of any appeal against their decision (k), but, if in such a case they do appear costs may be given against them (l). Where they are made parties to the case costs may be given for or against them (m).

**1403** The powers of the High Court in respect of the hearing of special cases are exercised by a Divisional Court of the King's Bench Division (n).

The court will only hear one counsel on each side (o). It will hear and determine the question or questions of law arising on the case and will reverse affirm or amend the decision appealed from (p), or it may in its discretion remit the matter to the justices with its opinion thereon (q) or make such order in regard to the matter as it may think fit (r).

**1404** The decision of the High Court (that is a Divisional Court of the King's Bench Division) in respect of a special case upon any criminal cause or matter, is final and conclusive (s) but

**SECT 2**  
**Appeals to the High Court**  
—  
Right of justices to appear  
lower of the High Court

Appeal to Court of Appeal.

the duty (see p 653 *ante*) on the part of the applicant to transmit the case to the court within three days of receiving it (*Phillips v Jones* (1888) 57 J P 84)

(j) *Smith v Butler* (1885) 16 Q B D 349

(k) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 6

(l) *Heywood v Whitehead* (1897) 76 L 1 731

(m) *Ellis v Lincoln Licensing Justices* (1888) 52 J P 88

(n) Judicature Act 1873 (36 & 37 Vict c 66) s 45 see title Courts Vol IX p 59 There is in the Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 8 provision for the powers of the Divisional Court to be exercised by order of the court by a judge in chambers but this provision is not commonly invoked

(o) *Howes v Peake* (1876) 33 L T 818 *Spurling v Bantoft* [1891] 2 Q B 384 *Bedfordshire Justices v St Paul Bedford (Churchwardens etc)* 1852) 7 Exch 650

(p) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 6 Where there is a joint conviction of several persons the conviction may be affirmed against some and reversed against others (*Brown v Turner* (1863) 13 C B (N s) 485 *O'Neill and Galbraith v Longman* (1863) 32 L J (M c) 259) The court cannot however on a special case reduce the penalty imposed by the justices (*Evans v Hemingway* (1887) 52 J P 134) When there is evidence to show that an offence within the jurisdiction of the justices was or might have been committed the court will not in general disturb the justices decision see *E v Davis* (1795) 6 Term Rep 177 *R v Reason* (1795) 6 Term Rep 375 *Blackpool Local Board of Health v Fenwick* (1859) 4 H & N 127 But it may quash a conviction where there is no evidence to support it (*Wallin v Fenwick* (1858) 7 W R 16)

(q) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 6 Where a magistrate having dismissed a summons the court upon case stated remitted the matter with an opinion that he should have convicted and on an application being made to the magistrate to restate the case and convict the magistrate held that he had no power to do so the court by mandamus compelled him to comply with its order (*R v Haden Corser* (1892) 8 T L R 563)

(r) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 6

(s) Judicature Act 1873 (36 & 37 Vict c 66) s 47 Where a case raising an important point of law is argued before a Divisional Court advantage is occasionally taken of the provision of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict c 59), s. 17, to hear the case re-argued

**SECT 2**  
**Appeals to**  
**the High**  
**Court**

What is a  
criminal cause  
or matter

upon civil matters there is a right of appeal to the Court of Appeal subject to the leave of the Divisional Court being obtained (t)

The proceeding will be deemed to be a criminal cause or matter wherever the subject matter is such that the hearing before the justices might have resulted in the infliction of imprisonment (a) or in the case of a sum of money claimed to be due when it is recoverable upon information as well as upon complaint (b)

Costs

**1405** The court may make such order as to costs as it thinks fit (c) and in practice usually allows them to the successful party (d) The costs given include the costs of preparing the special case (e) but not those incurred by the hearing before the

before a larger court compare *Saunders v Richardson* (1881) 7 Q B D 368

(t) Judicature (Procedure) Act 1894 (57 & 58 Vict c 16) ss 1 2 see *Walsall Overseers v London and North Western Rail Co* (1878) 4 App Cas 30

(a) *Robson v Biggar* [1908] 1 K B 672 C A compare *Mellor v Denham* (1880) 5 Q B D 467 C A *R v Whitchurch* (1881) 7 Q B D 534 C A *Payne v Wright* (1892) 61 L J (M C) 114 C A *Ex parte Schofield* [1891] 2 Q B 428 C A *Seaman v Burley* [1896] 2 Q B 344 C A

(b) Sums of money recoverable upon complaint but not upon information are deemed to be a civil debt (Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) ss 6 35) see p 609 *ante* An amount due for district rate has been held to be covered by this provision and a case in regard to it as a civil not a criminal matter (*Southwark and Vauxhall Water Co v Hampton Urban Council* [1899] 1 Q B 273 C A) But a case arising on a warrant of distress for default in payment of poor rate is a criminal cause or matter the procedure in regard to the recovery of poor rate being unaffected by the Summary Jurisdiction Acts (Summary Jurisdiction Act 1884 (47 & 48 Vict c 43) s 10 and see *Seaman v Burley* [1896] 2 Q B 344 C A)

(c) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 6 R S C Ord 65 is ordered to apply both to civil and criminal proceedings on the Crown side by the Crown Office Rules 1906 rr 261 262

(d) The court will in general give costs to a successful appellant (*Venables v Hardman* (1858) 28 L J (M C) 33 *Youdan v Crookes* (1858) 22 J P 287) and this is the case where the Crown is the unsuccessful party (*Moore v Smith* (1859) 1 E & E 597 and see *Walsh v R* (1888) 16 Cox C C 435) Where the respondent was successful costs have been refused in a case which was deemed fairly arguable (*Casuell v Cool* (1862) 12 C B (N S) 242) Where a conviction was quashed upon the ground of an objection not brought to the justices notice costs were refused (*Stinson v Browning* (1866) L R 1 C P 321) Where the respondent does not appear the practice is not uniform but in *Smith v Butler* (1885) 16 Q B D 349 it was held by the court to be unusual to give costs in such circumstances see also *Lee v Strain* (1859) 28 L J (M C) 221 *contra* *Wednesbury Local Board of Health v Stephenson* (1864) 33 L J (M C) 111 *Hulse v Alder* (1874) 38 J P 407 *Greenbank v Sanderson* (1884) 49 J P 40 *Shepherd v Folland* (1884) 49 J P 165 *Lee v Barton* (1909) 101 L T 600 603 n (a) Where however the court was of opinion that the respondent although not appearing before it had taken proceedings with a view of getting a point of law decided costs were given against him (*Gordon v Oann* (1899) 68 L J (Q B) 434) As to costs where the justices appear see p 655 *ante*

(e) *Glover v Booth* (1862) 31 L J (M C) 270 This includes the cost of preparing the case beyond the fees allowed to the justices clerk under the Summary Jurisdiction Act, 1857 (20 & 21 Vict c 43), s 3

justices (f) Application should be made for them immediately upon the determination of the case (g)

**SECT 2**  
**Appeals to**  
**the High**  
**Court**

Enforcement  
of judgment  
of the High  
Court.

**1406** After the determination of the case by the High Court, the justices whose decision was appealed from or any other justices exercising the same jurisdiction have authority to enforce the conviction or order if and as upheld or amended by the High Court in the same manner as it might have been enforced, but for the appeal by the justices who made it (h)

**SECT 3 — *Mandamus***

**1407** In addition to the prerogative powers inherent in the High Court to issue the writ of mandamus (i) provision is made by statute for the issue of the writ to justices who refuse to state a case (l) or to do any act relating to the duties of their office as justices (l)

When manda  
mus will lie

**1408** A distinction may be made between the principles upon which a rule will be granted where the act is a judicial and where it is a ministerial act. Where the justices are given a discretion in the exercise of their judicial powers and have exercised it the court will not interfere with their decision (m). Thus the court will not compel them to grant process where they have deliberately refused it (n) nor prescribe the conduct to be observed by them in

Principles  
upon which  
rule granted  
Judicial acts

(f) *Slaughter v Sunderland Corporation* (1891) 60 L J (M C) 91

(g) *Budenberg v Roberts* (1867) L R 2 C 1 292 see *Caswell v Cook* (1862) 12 C B (N S) 242

(h) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 9. The justices who enforce the decision of the High Court are protected by statute from proceedings being taken against them in consequence of any defect in the conviction or order (*ibid*)

(i) See title CROWN PRACTICE Vol X pp 77 *et seq*

(k) Summary Jurisdiction Act 1857 (20 & 21 Vict c 43) s 5. But a case can only be stated upon a point of law (*ibid* and see p 650 *ante*). The issue of a rule is in the discretion of the court even where the decision of the justices is wrong in law so that where a person upon whom a nominal penalty should have been inflicted has been in fact acquitted by the justices the court may decide not to require a case to be stated but if an innocent person were convicted and even a nominal penalty inflicted a special case would no doubt be required by the court (*R v Davy* [1899] 2 Q B 301 *per CHANNELL J* at p 307). Where justices have decided a case in accordance with a decision of the High Court from which there was no appeal they will not be compelled to state a case (*R v Sheil* (1900) 82 I T 587 C A)

(l) Justices Protection Act 1848 (11 & 12 Vict c 44) s 5

(m) *R v Ingham* (1889) 14 Q B 396 *R v Adamson* (1875) 1 Q B D 201 *Ex parte Lewis* (1888) 21 Q B D 191 *R v Gravesend Justices* (1891) 55 J P 277 see also *R v Paynter* (1857) 26 L J (M C) 102 *R v Dayman* (1857) 26 L J (M C) 128

(n) *Ex parte West* (1865) 29 J P 310 *Re Leeds Stipendiary Magistrate* (1877) 43 J P 743 *Ex parte Macmahon* (1883) 48 J P 70. This applies where the justice refuses to grant process upon the ground that the application is vexatious even if there is *prima facie* evidence of the commission of an offence (*P v Kennedy* (1902) 86 L T 753 and compare *R v Bros* (1901) 86 L T 581). Where one justice has refused to issue a summons upon complaint other justices may subsequently refuse to hear an

**SECT 3**  
**Mandamus**

**Ministerial**  
**acts**

**Where**  
**mandamus**  
**refused**

**Application**  
**how made**

**Appropriate**  
**remedy when**  
**jurisdiction**  
**impugned**

hearing a case, nor in the reception or rejection of evidence (o) But the court will compel the exercise of their discretion (p)

Where the act is a ministerial act the court will hold that the parties are bound to do it and will compel them to do so (q)

**1409** Where a special case is the more convenient remedy a rule for a mandamus will be refused (r), and a rule will not be issued to a clerk to justices, as he is merely the servant of the justices (s)

**1410** The application for a writ of mandamus must be made to a Divisional Court of the King's Bench Division by motion for an order nisi and in vacation to a judge in chambers for a summons to show cause upon the urgency of the matter being made apparent to the judge (t)

**SECT 4—Certiorari**

**1411** The judicial decisions of justices may also be reviewed by the High Court on a writ of *certiorari* (a) which is the appropriate remedy when the jurisdiction of the justices is impugned (b) The question whether it will issue is in the discretion of the High Court except in the case of a statute which expressly takes away (c) the right of applying for it (d)

information and take the recognisances of a prosecutor to proceed (*R v Bather* (1880) 42 L T 532)

(o) *R v Carden* (1879) 5 Q B D 1 *R v Yorkshire Justices Ex parte Gill* (1885) 53 L T 728

(p) *R v Boteler* (1864) 4 B & S 959 *R v Byrde and Pontypool Gas Co Ex parte Williams* (1890) 60 I J (M C) 17 *R v Adamson* (1875) 1 Q B D 201 *R v Brown* (1857) 26 L J (M C) 183

(q) Thus an order which is not appealed against must be enforced even though there appear to the justices to be doubts as to its validity (*R v Swindon Justices* (1878) 42 J P 407) The issue of a distress warrant for levying rates is a ministerial act which the justices will be compelled to do (*R v Oxfordshire Justices* (1849) 18 L J (M C) 222 *R v Jefferson* (1884) 48 J P 393 *R v Marsham* (1883) 48 J P 408 C A)

(r) *R v Wisbech Justices* (1890) 54 J P 743

(s) *Ex parte Hayward* (1863) 32 L J (M C) 89

(t) Crown Office Rules 1906 For details of the procedure see title CROWN PRACTICE Vol X pp 110 *et seq*

(a) See further title CROWN PRACTICE Vol X pp 155 *et seq* 186

(b) See *R v Kent Justices* (1880) 44 J P 298 A writ will be issued to quash a warrant of commitment issued by a justice under a mistake (*R v Doherty Ex parte Isaacs* (1909) 26 T L R 502)

(c) See title CROWN PRACTICE Vol X p 175 Among the more important statutes which include such a provision are the Larceny Act 1861 (24 & 25 Vict c 96) sees 111 the Malicious Damage Act 1861 (24 & 25 Vict c 97) sees 69 and the Offences against the Person Act 1861 (24 & 25 Vict c 100) sees 72 but there are many others which will be found cited in appropriate titles *passim* The right cannot however be taken away by any general words but only by an express enactment (*R v Rees* (1760) 1 Wm Bl 231) and in the case of the Crown the right is in no circumstances taken away unless the Crown is specially mentioned (*R v Boulthbee* (1836) 6 Nev & M (K B) 26 *Mountjoy v Wood* (1856) 1 H & N 58) Even where the right is said to be taken away by statute the court is not prevented from quashing an order founded upon a manifest defect of jurisdiction or manifest fraud in the party procuring the order (*Colonial Bank of Australasia v Willan* (1874) L R 5 P C 417 see *Ex parte Bradbury* (1878) 3 Q B D 509)

(d) A writ of *certiorari* will not be granted to question the decision of

Application must be made within six months of the date of the order or conviction which it is desired to remove (e)

SECT 4  
Certiorari

### SECT 5—Prohibition

**1412** A writ of prohibition (f) will issue to justices if they act in absence or excess of jurisdiction or in contravention of some statute or of the common law (g) When remedy appropriate

The point in respect of which it is applied for need not have been taken before justices (h) but it must be material (i), and must have arisen actually and not prospectively (h)

Except where the justices have acted palpably in absence or excess of jurisdiction (l) an application for a writ will not usually be granted after the proceedings in respect of which it is asked for have been determined (m) When granted

### SECT 6—Habeas Corpus

**1413** A rule will be granted calling on justices to show cause why a writ of *habeas corpus* (n) should not issue in the case of a prisoner who has been committed to prison under a defective warrant of commitment (o) but if before the rule is obtained a good warrant is delivered to the gaoler that is a sufficient answer to the rule (p) Purpose for which granted

It is customary in extradition proceedings where it is desired to appeal to the High Court to issue a rule to the metropolitan police magistrate who made the order for extradition to show cause why a writ of *habeas corpus* should not issue (q) In extradition proceedings

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the justices on a claim of right (*Ex parte Smith* (1890) 7 T J R 42) nor in general where the proper mode of redress is by appeal to quarter sessions (*Re Pudding Norton Overseers* (1864) 33 L J (M C) 136)

(e) *R v Boughey* (1791) 4 Term Rep 281

(f) See further title CROWN PRACTICE Vol X pp 141 *et seq* The issue of a writ is in the discretion of the court except where there was an absence or excess of jurisdiction apparent on the face of the proceedings in which case it is of right (*Farquharson v Morgan* [1894] 1 Q B 552 C A and the cases there cited) It will issue to prevent a justice interested in the subject matter of a case from hearing it (*R v Farrant* (1887) 20 Q B D 58) but the fact that a justice has been subpoenaed as a witness in a case is not sufficient evidence of interest to warrant the issue (*ibid*)

(g) *Macdonochie v Penzance* (Lord) (1881) 6 App Cas 424 and see the cases cited in title CROWN PRACTICE Vol X p 142

(h) Compare *De Haber v Portugal (Queen)* (1851) 17 Q B 171 196

(i) *Butterworth and Barker v Walker and Waterhouse* (1765) 3 Burr 1689

(k) *R v Kent Justices* (1889) 24 Q B D 181

(l) *Buggin v Bennett* (1767) 4 Burr 2035 *Farquharson v Morgan* [1894] 1 Q B 552 C A

(m) *Ricardo v Maidenhead Local Board of Health* (1857) 2 H & N 257

(n) See title CROWN PRACTICE Vol X pp 39 *et seq*

(o) *Ex parte Cross* (1857) 2 H & N 354 *Re Timson* (1870) 1 R 5 Exch 257

(p) *Ex parte Cross supra*

(q) See title EXTRADITION Vol XIV pp 415 416

## Part XIV—Appeals from Quarter Sessions.

### SECT 1

#### To the Court of Criminal Appeal

When the appeal lies

### SECT 1—*To the Court of Criminal Appeal*

**1414** An appeal to the Court of Criminal Appeal from a court of quarter sessions lies in the case of every person convicted before it of a criminal offence upon indictment (r) or dealt with by it as an incorrigible rogue (a). The grounds and conditions of appeal are the same as in the case of an appeal from the Central Criminal Court or a court of assize (b).

The case is dealt with finally by the Court of Criminal Appeal, and in no event is it remitted to the court of quarter sessions (c).

Jurisdiction of court

**1415** The jurisdiction of the judges of the High Court in regard to Crown cases reserved is now vested in the Court of Criminal Appeal (d) and the procedure provided by the Criminal Appeal Act has to a great extent superseded that previously existing but the Court of Criminal Appeal has still power to require a case to be stated in the same manner as if under the former procedure a question of law had been reserved (e).

### SECT 2—*Prohibition*

When the writ will issue

**1416** A writ of prohibition will issue to any court of quarter sessions in the same manner and on the same grounds as to any inferior court which acts without or in excess of its jurisdiction or

(r) Criminal Appeal Act 1907 (7 Edw 7 c 23) s 3. There is however no appeal against the part of a special verdict under the Trial of Lunatics Act 1883 (46 & 47 Vict c 48) s 2 finding a prisoner to be insane (*R v Machardy* [1911] W N 193). As to persons convicted on indictment at common law in relation to the non repair or obstruction of a highway public bridge or navigable river see p 665 *post*.

(a) Criminal Appeal Act 1907 (7 Edw 7 c 23) s 20 see the Vagrancy Act 1824 (5 Geo 4 c 83) s 5 p 635 *ante*.

(b) See title CRIMINAL LAW AND PROCEDURE Vol IX pp 433 *et seq*. The time within which notice of appeal must be given is ten days (Criminal Appeal Act 1907 (7 Edw 7 c 23) s 7). The chairman of the court must when required furnish the registrar of the Court of Criminal Appeal with his notes of the trial and with a report giving his opinion upon the case or upon any point arising in it (*ibid* s 8).

(c) *Ibid* ss 4 5 9. The conditions as to bail and as to costs are the same as in the case of appeals from the Central Criminal Court or a court of assize (*ibid* ss 13 14).

(d) *Ibid* s 20 (4). The former procedure was regulated by the Crown Cases Act 1848 (11 & 12 Vict c 78). The constitution of the court formed to hear Crown cases reserved was ultimately five judges of the High Court of whom unless prevented by illness the Lord Chief Justice of England had to be one (Judicature Act 1881 (44 & 45 Vict c 68) s 15).

(e) Criminal Appeal Act 1907 (7 Edw 7 c 23) s 20 (4). For procedure on a case so stated see further title CRIMINAL LAW AND PROCEDURE Vol IX p 433 note (k). Writs of error and the power and practice of moving for a new trial in criminal matters are abolished (Criminal Appeal Act 1907 (7 Edw 7 c 23) s 20 (1)) but the High Court still exercises control over the court of quarter sessions by means of writs of prohibition *certiorari*, and *mandamus* in certain cases and within defined limits see the text *supra* and pp 661 662, *post*.

which makes an order in contravention of some statute or the principles of the common law (*f*)

SECT 2  
Prohibition.

### SECT 3—*Certiorari*

**1417** The issue of a writ of *certiorari* to remove a matter for hearing and determination to the High Court is in the discretion of the High Court itself (*g*) except in those cases where that course is expressly forbidden by statute (*h*)

When the writ will issue

The principles on which the writ is issued to a court of quarter sessions are similar to those on which it would be issued to justices out of session (*i*)

**1418** Where an order of justices is confirmed by quarter sessions, the time within which an application for a writ will run dates from the time of confirmation (*l*)

When time runs

**1419** In the case of indictments, removal to the High Court by *certiorari* is governed by the following conditions. Except indictments against bodies corporate which are not authorised to appear by solicitor at quarter sessions (*l*) indictments are not to be removed either at the instance of the prosecutor or defendant unless it is made to appear to the court on behalf of the applicant that a fair and impartial trial cannot be had at quarter sessions, or that some question of law of more than usual difficulty and importance is likely to arise at the trial, or that a view of the premises in respect whereof the indictment is preferred or a special jury is required for a satisfactory trial of the case (*m*)

Conditions governing removal of indictments

The party, whether prosecutor or defendant applying for a writ of *certiorari* to remove an indictment is required to enter into recognisances to appear at the trial and pay the costs if unsuccessful (*n*)

Recognisances

Neither of these conditions binds the Attorney General acting on behalf of the Crown (*o*)

Attorney General

(*f*) See title CROWN PRACTICE Vol X pp 141 *et seq* and p 659 *ante*. The grounds for its issue would include the acting of an interested party as a member of the court (title CROWN PRACTICE Vol X p 143 compare *R v Cambridge (Recorder)* (1857) 8 F & B 637)

(*g*) *R v Walsall Overseers* (1878) 3 Q B D 457 C A *per* COCKBURN C J at p 471 see *R v Leicester Justices and Compton* (1860) 29 L J (M C) 203 *R v Surrey Justices* (1870) L R 5 Q B 466 *R v Sheward* (1880) 9 Q B D 741 C A

(*h*) *R v Moreley* (1760) 2 Burr 1040. Among statutes which expressly take away the right of applying for *certiorari* are the Game Act 1831 (1 & 2 Will 4 c 32) s 45 Public Health Act 1875 (38 & 39 Vict c 55) s 262 Municipal Corporations Act 1882 (45 & 46 Vict c 50) s 220 and see p 658 *ante*

(*i*) See p 658 *ante*

(*k*) *R v Morice* (1845) 14 L J (M C) 75 *R v Middlesex Justices* (1836) 5 Ad & El 626

(*l*) See for instance titles COUNTY COURTS Vol VIII p 610 HIGHWAYS, STREETS AND BRIDGES Vol XVI pp 142 143

(*m*) Crown Office Rules 1906 r 13

(*n*) *Ibid* rr 14, 15

(*o*) *Ibid*, rr 13, 15



**SECT 3**  
**Certiorari**

How  
returned

**1420** A writ of *certiorari* when issued to quarter sessions in counties is directed to the justices collectively and returned by the chairman or some other justice acting on his behalf, in boroughs it is directed to and returned by the recorder (b) The return cannot be made by the clerk of the peace (c)

When not  
required

**1421** No *certiorari* is required for the removal of any conviction, order or other determination in relation to which a special case is stated by quarter sessions (d)

**SECT 4 —Mandamus**

When the  
writ will not

**1422** A writ of mandamus (e) will not issue to a court of quarter sessions in respect of any matter in which it has exercised its jurisdiction (f) In such cases whether the decision of the quarter sessions is right or wrong (g) or whether the matter is one of law or fact (h) the writ will not issue

Discretion of  
quarter  
sessions to  
state case

It is within the discretion of quarter sessions to state a case for the opinion of the High Court (i) but if they do not state a case the High Court will not compel them by mandamus to do so (k) nor intervene to review their decision by compelling them to state the reasons for it (l) or to alter the form of the record (m) Similarly, in matters wherein the quarter sessions have a discretion and exercise it the writ will not issue (n)

When the  
writ will  
issue

It is otherwise where the court of quarter sessions has declined jurisdiction altogether (o) or has come to a decision wrong in point of law upon a preliminary objection (p) or has failed to exercise its

(b) *Anon* (1703) 6 Mod Rep 43 see Archbold Practice of Quarter Sessions 6th ed 137

(c) *Ashley's Case* (1697) 2 Salk 479

(d) Summary Jurisdiction Act 1879 (42 & 43 Vict c 43) s 40 As to special case see p 650 *ante* and p 663 *post*

(e) See further title CROWN PRACTICE Vol X pp 77 *et seq* 89 90

(f) *R v Worcestershire Justices* (1854) 3 L & B 477 *R v Middlesex Justices* (1877) 2 Q B D 516 see *R v Surrey Justices* (1824) 5 Dow & Ry (κ B) 308 *Ex parte Martin* (1876) 40 J P 133

(g) *R v Cambridgeshire Justices* (1820) 4 B & Ald 86

(h) *Re Pratt* (1837) 7 Ad & El 27

(i) *R v Nottingham (Inhabitants)* (1834) 4 Nev & M (κ B) 215 and see p 664 *post*

(l) *R v Preston (Inhabitants)* (1833) 5 B & Ad 597 *Re Pratt supra* *Ex parte Jarvin (Inhabitants)* (1849) 9 Dowl 120

(l) *R v Devon Justices* (1819) 1 Chit 34 *R v Nottingham (Inhabitants) supra*

(m) *R v Suffolk Justices* (1835) 5 Nev & M (κ B) 139 *Ex parte Aokworth Overseers* (1843) 3 Q B 397 *R v Middlesex Justices supra* A mandamus will however issue to direct alteration of an entry which is manifestly false where there is no jurisdiction to make it (*R v West Riding of Yorkshire Justices* (1843) 5 Q B 1)

(n) *R v West Riding of Yorkshire Justices* (1834) 5 B & Ad 1003 *R v Derbyshire Justices* (1852) 22 L J (m c) 31 and see *R v North Riding of Yorkshire Justices* (1823) 2 B & C 286

(o) *R v Kent Justices* (1811) 14 East 395 *R v Colchester Justices* (1822) 5 B & Ald 535 *R v Wiltshire Justices* (1828) 8 B & C 380

(p) *R v Kesteven Justices* (1844) 3 Q B 810 *R v Oxfordshire Justices* (1843) 4 Q B 177. Where the court of quarter sessions declines to act on the ground that the notice of appeal is insufficient, the High Court will

discretion (*q*) But a mandamus in any case will merely direct the court of quarter sessions to exercise its jurisdiction or discretion, and will not specify the manner in which it is to exercise it (*r*)

It is within the competence of the court of quarter sessions to formulate its own rules of practice but the High Court will issue a mandamus in cases where adherence to such rules can be shown to involve a failure of justice (*s*)

SECT 4  
Mandamus  
—

### SECT 5—*Special Case*

**1423** On an appeal to quarter sessions, the parties may, at any time after the notice of appeal consent to a special case being drawn under the order of a judge of the High Court and submitted to the High Court for its decision (*t*)

By consent of  
the parties

The judgment of the High Court may then be entered on motion by either party at the sessions next or next but one after it is given and is of the same effect as if it had been given by the court of quarter sessions upon an appeal duly entered and continued (*a*) It is however essential that the case should state the agreement of the parties to this procedure (*b*) and a case may not be so stated upon an appeal against an order in bastardy nor in proceedings under the statutes relating to the Revenue Excise or Post Office (*c*)

Entry of  
judgment.

Where a case has been stated under these provisions the party supporting the order of the justices is entitled to begin (*d*) An

determine the question and issue a mandamus if required (*Ex parte Curtis* (1877) 3 Q B D 13) Where in London the court of quarter sessions had refused to hear a rating appeal on the ground that it should have been entered at general not quarter sessions for which notice might have been given in time the court granted a mandamus to the justices to hear the case holding that the appellant was not bound to enter the appeal except at a quarter sessions (*R v London Justices* (1812) 15 East 632) The court will intervene to secure the hearing of an appeal which the court of quarter sessions has respite (see p 646 *ante*) and at the next sessions has refused to hear upon the ground of an objection which might have been raised at the hearing of the case when first entered (*R v Wiltshire Justices* (1828) 8 B & C 380) or to prevent injustice being done to an appellant who had agreed to abide by the decision of a similar case when the respondent in that case disobeyed the decision of the court (*R v Wiltshire Justices* (1801) 1 East 683)

(*q*) *R v Glamorganshire Justices* (1850) 19 L J (M C) 172 *R v Derbyshire Justices* (1852) 22 L J (M C) 31

(*r*) *Ibid* *R v West Riding of Yorkshire Justices* (1833) 5 B & Ad 667 *R v Hewes* (1835) 3 Ad & El 725 *Ex parte Ackworth Overseers* (1843) 3 Q B 397

(*s*) *R v Suffolk Justices* (1817) 6 M & S 57 *R v Norfolk Justices* (1834) 5 B & Ad 990 *Re Blues* (1855) 5 E & B 291 *R v Paulitt* (1873) L R 8 Q B 491

(*t*) Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 11

(*a*) This procedure though technically an appeal from quarter sessions is to be distinguished from cases stated by the court of quarter sessions itself (as to which see pp 664 665 *post*) and is not affected by the provisions of the Judicature (Procedure) Act 1894 (57 & 58 Vict c 16),

s 2

(*b*) *Peterborough Corporation v Thurlby Overseers* (1882) 8 Q B D 586

(*c*) Quarter Sessions Act 1849 (12 & 13 Vict c 45) s 11

(*d*) *R v Holbeck Overseers* (1851) 16 Q B 404 *Bedfordshire Justices v St Paul, Bedford (Churchwardens etc)* (1852), 7 Exch 650

SECT 5  
Special  
Case

appeal lies to the Court of Appeal from the decision of the High Court (e) and this is so even after judgment has been entered at quarter sessions in accordance with the decision (f)

The practice is to give costs as between party and party (g)

At the  
discretion of  
the justices

**1424** With the exception of the above provisions, which only deal with matters not already heard by quarter sessions there was formerly no means of obtaining the decision of the High Court on a special case stated by quarter sessions except after obtaining a writ of *certiorari* (h) While this method of procedure still subsists it is now within the competence of quarter sessions to state a case without any such procedure (i) The discretion of quarter sessions in regard to the granting of special cases is however absolute there is no means of compelling the justices to state one even though in the particular circumstances a proper exercise of their discretion would undoubtedly lead them to do so (l)

Comparison  
with case  
stated at  
petty sessions

A case stated by quarter sessions is therefore wholly different from a case stated by justices at petty sessions in that it is the magistrates and not the aggrieved party who seek the assistance of the court and, in consequence of this the opinion of superior tribunals can be obtained even in cases where under the particular statute involved the decision of quarter sessions is ordered to be final (l)

(e) *Peterborough Corporation v Wulsthorpe Overseers* (1883) 12 Q B D 1  
C A *Holborn Guardians v Chertsey Guardians* (1885) 15 Q B D 76  
C A *Dewsbury and Heckmondwike Waterworks Board v Tenstone Union Assessment Committee* (1886) 2 F L R 375 C A

(f) *Lodge v Huddersfield Corporation* [1898] 1 Q B 859 C A

(g) *Clarendon (Earl) v St James Westminster (Rector etc)* (1851) 10 C B 806 *Holy Trinity Exeter v Ide (Churchwardens etc)* (1851) 16 L T (o s) 363

(h) *R v Chantrell* (1875) L R 10 Q B 587 *Walsall Overseers v London and North Western Rail Co* (1878) 4 App Cas 30 Under that procedure the court of quarter sessions embodied the material and grounds of its decision in the decision itself with the result that any error in law became manifest on the face of the record and therefore cognisable by the superior courts (*Kydd v Liverpool Watch Committee* [1907] 2 K B 591 C A *per* FLETCHER MOUTON L J at p 603) But it could not be adopted in cases where the right to *certiorari* was removed by statute (see pp 658 661 *ante*) The ancient practice open to the court of quarter sessions of consulting the judge of assize and asking his assistance and advice in making an order (as to which see *Walsall Overseers v London and North Western Rail Co supra per* EARL CAIRNS L C at p 40) is to be distinguished in that the court still retained and exercised its jurisdiction after the consultation had taken place See further title CROWN PRACTICE Vol X p 166

(i) Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 40

(l) *Ex parte Jarvin (Inhabitants)* (1840) 9 Dowl 120 *R v Oulton (Inhabitants)* (1735) Burr s C 64 *Walsall Overseers v London and North Western Rail Co supra* s C *sub nom* *R v Walsall Overseers* (1878) 3 Q B D 457 C A *per* COCKBURN C J at p 473 *Kydd v Liverpool Watch Committee supra per* BUCKLEY L J at p 609

(l) *Kydd v Liverpool Watch Committee supra* *Upperton v Ridley* [1903] A C 281, *Garbutt v Durham Joint Committee* [1906] A C 291 compare *Westminster Corporation v Gordon Hotels Ltd* [1907] 1 K B 910 C A as to the impossibility of having a petty sessional court's decision reviewed where its decision is made final by statute

**1425** Where the court of quarter sessions comes to a decision in a matter subject to a special case to be stated on some particular question, the High Court will issue a mandamus to compel the justices either to state the case (*m*), or to enter continuances and hear and determine the matter (*n*) but it is otherwise where the justices, although having agreed in general terms to state a case decide against the party desiring the case on the facts on which the point of law depends (*o*)

SECT 5

Special  
CaseWhen justices  
must state  
case

**1426** The court of quarter sessions has no power to state a special case upon the trial of any indictment (*p*) other than an indictment at common law in relation to the non repair or obstruction of a highway public bridge or navigable river (*q*) but it may state a case upon any other matter which comes before it for final decision (*r*) including appeals against convictions for non indictable offences (*s*) and appeals to it as the confirming authority in licensing matters (*t*)

When justices  
may state  
case

**1427** The High Court is entitled to prescribe the form in which the special case is to be presented to it and formerly at all events refused to deal with cases not drawn in a form suited to the procedure of *certiorari*, where the judgment of the court must be either to quash or to refuse to quash the order of quarter sessions (*a*) If the case is improperly or insufficiently stated the High Court may remit it to be restated (*b*)

Form

The case should be signed by the chairman of the court or the recorder and must conform to the rules laid down by the High Court (*c*)

**1428** Where the court of quarter sessions grants a special case it must be settled and stated within a reasonable time which formerly owing to the practice in *certiorari* was limited to six months (*d*)

Time

(*m*) *R v Bloxam* (1834) 1 Ad & El 386

(*n*) *H v Suffolk Justices* (1832) 1 Dowl 163

(*o*) *R v Pembrokeshire Justices* (1831) 2 B & Ad 391 *Ex parte Jarman* (*Inhabitants*) (1840) 9 Dowl 120

(*p*) Unless called upon to do so by the Court of Criminal Appeal see the Criminal Appeal Act 1907 (7 Edw 7 c 23) s 20 (1) and p 660 *ante* see also *R v Salop (Inhabitants)* (1810) 13 East 95 Cases relating to incorrigible rogues are treated in this respect as if they were indictable offences (Criminal Appeal Act 1907 (7 Edw 7 c 23) s 20 (2))

(*q*) *Ibid* s 20 (3)

(*r*) Where the court of quarter sessions states a case the decision on which will not finally determine the matter the High Court will not entertain the case (*R v Sutton Coldfield* (1874) L R 9 Q B 153 *R v Southampton Licensing Justices* [1906] 1 K B 446 *per* Lord ALVERSTONE C J at p 449)

(*s*) *R v Allen* (1812) 15 East 333 *R v Handley* (1864) 9 L T 827

(*t*) *R v Southampton Licensing Justices Ex parte Cardy* [1906] 1 K B 446

(*a*) *Kydd v Liverpool Watch Committee* [1907] 2 K B 591 C A *per* FLETCHER MOULTON L J at p 607 see Crown Office Rules 1906 and title CROWN PRACTICE Vol X pp 160 *et seq*

(*b*) Judicature (Procedure) Act 1894 (57 & 58 Vict c 16) s 2 (2) see *R v St Peter Mancroft in Norwich (Inhabitants)* (1800) 8 Term Rep 477 *R v Lillingham (Inhabitants)* (1830) 1 B & Ad 180

(*c*) See p 654 *ante*

(*d*) *R v Staffordshire Justices* (1832) 1 Dowl 484 see Archbold, Practice of Quarter Sessions, 6th ed 453.

SECT 8  
Special  
Case

Function of  
High Court.

**1429** The High Court may draw any inference of fact which might have been drawn by the court of quarter sessions, and may give any judgment or make any order which that court would have been competent to make or may remit the case, with its opinion and direction thereon, for the court of quarter sessions to hear and determine the case afresh (e) But the case as stated by the court of quarter sessions should contain its conclusions of fact and not merely the evidence on which the conclusions were drawn (f) and should show that it has already decided the matter subject to the decision of the High Court so that upon the latter being given the matter may be finally determined (g)

Inferences of fact drawn by the court of quarter sessions even if the facts are doubtful in themselves will not be lightly disregarded by the High Court (h)

Appeal.

**1430** Every such case is now deemed to be an appeal and is heard and determined accordingly (i) There is in consequence no appeal from the decision of the High Court except by leave of that court or of the Court of Appeal (j)

Entry of  
judgment

**1431** The judgment of the High Court or the case itself if remitted for a fresh hearing is to be entered at the sessions next or next but one after the decision of the High Court and unless the High Court directs otherwise is to be deemed to have been entered at the sessions at which the decision appealed from was given further entry and continuances being dispensed with (l)

Costs

**1432** The High Court or, if leave to appeal is given the Court of Appeal has power to award costs of the hearing both in that court and before the court of quarter sessions (m)

(e) Judicature (Procedure) Act 1894 (57 & 58 Vict c 16) s 2 (2)

(f) *R v St Cuthbert Wells (Inhabitants)* (1834) 5 B & Ad 939 *R v Pilkington (Inhabitants)* (1844) 5 Q B 662 Where on the facts of a particular case there may or may not have been fraud the High Court will not presume fraud unless specifically found by quarter sessions (*R v Tillingham (Inhabitants)* (1788) 2 Term Rep 709 *R v Tillingham (Inhabitants)* (1830) 1 B & Ad 180)

(g) *R v Wistow (Inhabitants)* (1841) 3 Q B 815 n *R v Worth* (1843) 4 Q B 132 *R v Westhoughton (Inhabitants)* (1843) 5 Q B 300 *R v Stoke upon Trent (Inhabitants)* (1843) 5 Q B 303 *R v Marton cum Grafton (Inhabitants)* (1847) 10 Q B 971 *R v Headington Union Guardians* (1884) 50 L T 444 C A

(h) *R v St Andrew the Great Cambridge* (1828) 8 B & C 664 *R v Roshiston (Inhabitants)* (1828) 8 B & C 668 *R v St Martin Leicester* (1828) 8 B & C 674 *R v Kesteven Justices* (1844) 3 Q B 810 But in a case where the inference was one of mixed fact and law the High Court reversed the decision of quarter sessions (*R v Great Glenn (Inhabitants)* (1833) 5 B & Ad 188)

(i) Judicature (Procedure) Act 1894 (57 & 58 Vict c 16) s 2 (1)

(j) *Ibid* s 1 (5)

(l) *Ibid* s 2 (4)

(m) *Ibid* s 2 (3).

## MAIN ROADS

*See* HIGHWAYS STREETS AND BRIDGES.

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## MAINTENANCE

*See* BASTARDY HUSBAND AND WIFE INFANTS AND CHILDREN,  
LUNATICS AND PERSONS OF UNSOUND MIND, POOR LAW,  
SETTLEMENTS, WILLS

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# MAINTENANCE AND CHAMPERTY

*See* ACTION

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# MALICIOUS DAMAGE

*See* AGRICULTURE CRIMINAL LAW AND PROCEDURE,  
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# MALICIOUS PROSECUTION AND PRO- CEDURE

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## Part I—Malicious Prosecution and Abuse of Criminal Proceedings.

### SECT 1—What is a Prosecution

What is a  
prosecution

**1433** A prosecution exists where a criminal charge (a) is made before a judicial officer or tribunal (b) and any person who makes

(a) *Rawlins v Jenkins* (1843) 4 Q. B. 419 *Rayson v South London Tramways Co* [1893] 2 Q. B. 304 O. A. The Tramways Act 1870 (33 & 34 Vict. c. 78) s. 51 creates a criminal offence (*ibid*) As to the malicious abuse of civil proceedings, see p. 688, *post*

(b) See *Austin v Dowling* (1870), L. R. 5 C. P. 534, 538, 540

or is actively instrumental in the making or prosecuting of (c) such a charge is deemed to prosecute it, and is called the prosecutor (d). Thus a person who lays before a magistrate an information stating that he suspects and has good reason to suspect another (e) or who prefers a bill against him before a grand jury (f) is engaged in a prosecution, and he may be responsible for the prosecution, even though the charge made before the magistrate is an oral one (g) and though after the making of the charge before the magistrate or even without making one (h), he is bound over to prosecute and does so (i). So too a trustee in bankruptcy, being ordered by a court upon reading the trustee's report to prosecute an alleged fraudulent debtor, may be liable to an action for malicious prosecution (j).

SECT 1  
What is a  
Prosecution

**1434** Malicious prosecution is distinguished from a false imprisonment effected through the instrumentality of a constable in this respect that in the case of the latter the charge acted on is made to a ministerial officer, and the arrest is a trespass for which the defendant makes himself directly responsible. Malicious prosecution, as such involves no trespass: it is a proceeding before a judicial officer or tribunal for whose acts the defendant is not directly responsible. Under the old system of pleading it only gave rise to an action on the case (k).

Malicious  
prosecution  
distinguished  
from false im-  
prisonment

(c) *Danby v Beardsley* (1880) 43 L T 603 and see *Osterman v Bateman* (1848) 2 Car & Kir 728. As to an unauthorised prosecution by one partner see *Arbuckle v Taylor* (1815) 3 Dow 160 H L.

(d) *Davis v Noak* (1816) 1 Stark 377. *Dubois v Heats* (1840) 11 Ad & El 329. *Fitzjohn v Mackinder* (1861) 9 C B (N s) 505. *Austin v Dowling* (1834) 6 C & P 534 535 540.

(e) *Davis v Noak* *supra*. As to setting out the information in a statement of claim see *Gregory v Derby* (1839) 8 C & P 749.

(f) *Payn v Porter* (1818) Cro Jac 490.

(g) *Dawson v Vansandau* (1863) 11 W R 516 see also *Clarke v Postan* (1834) 6 C & P 423.

(h) *Fitzjohn v Mackinder* *supra* (where the defendant during the trial of an action wilfully made a false allegation of perjury against the plaintiff and was bound over by the judge to prosecute).

(i) *Dubois v Heats* *supra* see and compare *Chambers v Taylor* (1602) Cro Plz 900 (where the plaintiff by demurring to the defence admitted the special matter set up therein as showing reasonable and probable cause for the prosecution).

(j) *Mittens v Foreman and Cameron* (1888) 58 L J (Q B) 40 see Debtors Act 1869 (32 & 33 Vict c 62) ss 16 17 and title BANKRUPTCY AND INSOLVENCY Vol II p 30.

(k) *Austin v Dowling* *supra*. *Harris v Warre* (1879) 4 C P D 125. *Lock v Ashton* (1848) 12 Q B 871 (a remand is an act of the magistrate and is not the subject of an action for false imprisonment). See also *Guest v Warren* (1854) 9 Exch 379. *Johnstone v Sutton* (1786) 1 Term Rep 510 544 Ex Ch compare *Cooper v Booth* (1785) 3 Esp 135 144. *Eles v Smeth* (1822) 1 Dow & Ry (K B) 97. The mere signing of the charge sheet after an arrest by a constable will not render the person so signing liable to an action for false imprisonment (*Grinham v Willey* (1809) 4 H & N 496. *Seuell v National Telephone Co Ltd* [1907] 1 K B 501 C A). See further titles CRIMINAL LAW AND PROCEDURE, Vol IX pp 606 *et seq*, TRESPASS.

## SECT 2

Who may be  
liable as  
Prosecutor

Who may be  
liable

## SECT 2—Who may be Liable as Prosecutor

## SUB SECT 1—In Genera \*

**1435** A person who prosecutes another in the sense explained above may be liable (*l*) as prosecutor and so may one who represents himself as prosecutor though he did not in fact initiate the prosecution and is present only as a witness (*m*). But the mere fact that a witness is bound over with another (the real prosecutor) to prosecute and give evidence will not render the former liable to an action for the prosecution (*n*).

A person who fairly states the facts to a magistrate and makes no specific charge against anyone will not be responsible in an action for malicious prosecution to a person against whom the magistrate issues a warrant of arrest (*o*).

Position of  
magistrate

**1436** A magistrate who acts as such in a prosecution has been held not to be liable to an action for malicious prosecution even though he procures some of the witnesses to appear against the person prosecuted and though his own name is indorsed as that of a witness on the indictment (*p*).

Grand jury

Again an action will not lie against a grand jury for their finding, for they are compellable to serve and their verdict is a matter of record (*q*).

Prosecutor in  
naval and  
military  
courts.

**1437** A naval or military court martial or court of inquiry is not a court into whose proceedings the civil courts are competent to inquire and a prosecution before it when within the true limit of its jurisdiction cannot though malicious and without reasonable and probable cause be called in question in a court of law (*r*).

(*l*) As to liability of husband to wife see title HUSBAND AND WIFE Vol XVI p 460 note (*h*).

(*m*) *Clements v Olrly* (1847) 2 Car & Kir 696. If during the proceedings the defendant heard himself described as prosecutor without contradicting it the jury may infer that he represented himself as such (*ibid*).

(*n*) *Eager v Dyott* (1831) 5 C & P 4. *Browne v Stradling* (1836) 5 L J (C P) 295. see *Dubois v Keats* (1840) 11 Ad & El 329. *Fitzjohn v MacLinder* (1861) 9 C B (N S) 505.

(*o*) *Lough v Webb* (1800) 3 Esp 164. *Cohen v Morjan* (1825) 6 Dow & Ry (K B) 8. and see *Milton v Ilmore* (1830) 4 C & P 456. *Indit Gaya Iarshal Lewari v Sardar Bhagat Singh* (1908) 24 T L R 884 P O (false statements knowingly made by defendant to policeman).

(*p*) *Girlington v Pitfield* (1669) 1 Vent 47. From the report of the same case in 2 Keb 572 the inference might be drawn that on strict proof of malice and on proof that the magistrate was the real prosecutor an action would lie. For the conditions necessary to support an action against a magistrate for a malicious conviction see *Burley v Bethune* (1814) 5 Taunt 580 under the repealed Justices Protection Act 1803 (43 Geo 3 c 141) see now Justices Protection Act 1848 (11 & 12 Vict c 44) ss 2 13. *Simplin v French* (1823) 12 Price 394. *Stevens v Clarke* (1842) Car & M 509 (warrant without any proper information). *Gelen v Hall* (1857) 2 H & N 379. *Quere* however whether such an action now lies in any circumstances for a matter within his jurisdiction (*Anderson v Gorrie* [1895] 1 Q B 668 C A per Lord Esher M R at p 671, *Law v Llewellyn* [1906] 1 K B 487 C A. see *Mason v Barker* (1843) 1 Car & Kir 100). And as to the position of magistrates generally see title MAGISTRATES p 531 ante.

(*q*) *Floyd v Barker* (1807) 12 Co Rep 23. see *Sutton v Johnstone* (1786), 1 Term Rep 493 503 Ex Ch.

(*r*) See *Sutton v. Johnstone*, *supra*, at pp 510 549 affirmed p 784 H L,

## SUB SECT 2—Master or Principal

## SECT 2

**1438** The question of the liability of a master or principal for a malicious prosecution instituted by his servant or agent does not often arise because, as a rule there is sufficient time to report and leave to the master or principal the onus of deciding whether he will prosecute or not (s). A master or principal is not liable for a malicious prosecution by his servant or agent unless the prosecution was within the scope of the servants or agents authority express or implied or unless there has been a ratification (t). Such authority may be general or a particular or limited authority to act in cases of emergency (u).

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Liability of  
master or  
principal

Agent's  
authority

No general authority to prosecute can be implied unless the prosecution of an offender falls within the ordinary scope of a servants or agents duties (u). Such an authority might possibly be implied for example in the case of the general manager of a banking company invested with general supervision and power of control at least in the absence of his directors or possibly in the case of a manager conducting the bank's business at a distance from the head office and the directors (a) but certainly not where he has the opportunity of consulting them (t).

General  
authority

In the case of an authority limited to cases of emergency a plaintiff must show that the emergency existed or might reasonably have been supposed to exist (a).

Limited  
authority

**1439** Frequently a prosecution by a servant or agent is preceded by an imprisonment or giving into custody in which case also to make the master or principal liable it must be shown in the absence of express authority or ratification that the act was within

Prosecution  
preceded by  
imprison-  
ment

*Dawkins v Rolby (Lord)* (1866) 4 I. & F. 806 at pp 832 833. It is true that it was not necessary to decide this in *Sutton v Johnstone* (1886) 1 Term Rep 493 510 549 Ex Ch affirmed 184 H L as there is reasonable and probable cause was proved. But the opinion of the court has been well recognised in later cases (see *Dawkins v Rolby (Lord)* *supra* *Dawkins v Paulet (Lord)* (1869) L R 5 Q B 94 *Dawkins v Rolby (Lord)* (1873) 1 R 8 Q B 275 Ex Ch affirmed (1875) 1 R 1 H L 144 *Grant v Secretary of State for India* (1877) 2 O P D 415 *Harvis v Keppel* (1866) 2 Wils 314). As to the reasons for this statement consider the essentials to an action stated at p 617 *post*. As to such courts see title ROYAL FORCES.

(s) An agent e.g. a solicitor who acts maliciously and without reasonable and probable cause may himself (irrespective of the question of his principal's liability) be liable in an action for malicious prosecution (*Johnson v Limeron* (1871) L R 6 Exch 329) see also *Stevens v Midland Counties Rail Co* (1854) 10 Exch 352 and see generally titles AGENCY Vol I pp 224 *et seq.*, MASTER AND SERVANT SOLICITORS.

(t) See *Barwick v English Joint Stock Bank* (1867) L R 2 Exch 259 Ex Ch; *Mitchell v Williams* (1843) 11 M & W 205 213 *Bank of New South Wales v Ouston* (1880) 4 App Cas 270 P O *Knight v North Metropolitan Tramways Co* (1898) 18 L R 227 *Stevens v Midland Counties Rail Co* *supra*. A defendant is not deemed to adopt a prosecution begun by his agents without his knowledge or sanction by merely attending the magistrates' court to hear what evidence may be given (*Weston v Beeman* (1857) 2 L J (EX) 57).

(u) *Bank of New South Wales v Ouston* *supra*.

(a) *Bank of New South Wales v Ouston* *supra* at p 291. This case which was in the Privy Council has been approved by the Court of Appeal in *Abrahams v Deakin* [1891] 1 Q B 390 Q A., and by a Divisional Court in *Hanson v Waller* [1901] 1 K B 390.

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the scope of the servants or agents authority (b), or as it is sometimes called, of his employment (c) Numerous cases which have been decided with reference to false imprisonment throw light on the application of this principle to malicious prosecution, since they establish that though a servant may have implied authority to arrest a person for the protection of his master's property or in case of other emergency (d), authority to give into custody for the mere purpose of vindicating justice will not be implied in the absence of some such special circumstances (e) as have been indicated above (f)

**SUB SECT 3 — Corporations**

**Liability of**  
**corporations**  
**and**  
**companies**

**1440** The weight of authority (g) clearly shows that an action

(b) See e.g. *Polton v London and South Western Rail Co* (1861) L R 2 Q B 534 and see generally title **INDEMNITY**

(c) *Bayley v Manchester Sheffield and Lincolnshire Rail Co* (1873) I R 8 C P 144 Ex Ch and see title **AGENCY** Vol I p 212

(d) See e.g. *Goff v Great Northern Rail Co* (1861) 3 L & L 672 distinguished in *Polton v London and South Western Rail Co* *supra* (arrest where the company itself had no power to arrest) In such a case the servant can have no implied power to arrest see also *Moore v Metropolitan Rail Co* (1872) L R 8 Q B 36 *Richards v West Middlesex Waterworks Co* (1885) 15 Q B D 660

(e) *Allen v London and South Western Rail Co* (1870) L R 6 Q B 65 (arrest ordered by booking clerk on charge of attempted robbery) *Abrahams v Deal* [1891] 1 Q B 516 O A (where manager of bar of public house gave a person into custody on charge of attempting to pass bad money) *Hanson v Waller* [1901] 1 K B 390 (where manager of public house gave plaintiff into custody on charge of stealing but such act was not necessary for protection of master's property) *Idwards v London and North Western Rail Co* (1870) L R 5 C P 445 (where foreman porter gave a person into custody whom he suspected to be stealing company's property) *Seuell v National Telephone Co Ltd* [1907] 1 K B 551 C A (plaintiff arrested on charge sheet signed by defendants manager) See also the following cases where the principal was held not liable for the acts of the agent — *Eastern Counties Rail Co v Broom* (1851) 6 Exch 314 Ex Ch *Roe v Birkenhead Lancashire and Cheshire Junction Rail Co* (1851) 1 Exch 56 *Giles v Taff Vale Rail Co* (1853) 2 L & B 822 *Stevens v Midland Counties Rail Co* (1854) 10 Exch 352 *Charleston v London Tramways Co* (1888) 4 T L R 629 C A *Stevens v Hunsletwood* (1891) 55 J P 341 C A As to evidence of ratification see *Eastern Counties Rail Co v Broom* *supra* *Moon v Louers* (1860) 8 C B (N S) 611 and title **AGENCY** Vol I p 179 As to proof of extent of agent's authority see *Giles v Taff Vale Rail Co* *supra* *Goff v Great Northern Rail Co* *supra* *Lambert v Great Eastern Railway* [1909] 2 K B 776 C A and title **AGENCY** Vol I p 212

(f) See p 673 ante

(g) Until recently doubts existed as to whether an action for malicious prosecution would lie against a corporation aggregate or incorporated company. Eminent judges have stated that such an action would not lie, in substance on the ground that a corporation having no soul cannot be actuated by a malicious intention see *Stevens v Midland Counties Rail Co* *supra* per ALDERSON B *Henderson v Midland Rail Co* (1871) 4 L T 381, per BRAMWELL B, *Abrath v North Eastern Rail Co* (1856) 11 App Cas 247 per Lord BRAMWELL see also *Western Bank of Scotland v Addie Addie v Western Bank of Scotland* (1867) L R 1 S & D 155, 160 (fraud) disapproved in *Citizens Life Assurance Co v Brown*, [1904] A C 423 P O In *Rail v Midland Great Western of Ireland Rail Co* (1872) 1 L R O L 8, the question was raised but not decided. Some American decisions now overruled. Also supported that doctrine (*Childs v Bank of Missouri* (1852) 17 Missouri Reports, 213, *Owsley v Montgomery* *West Point Rail Road Co* (1861) 37 Alabama Reports, 580, but compare *McDermott v Evening Journal* (1881)

for malicious prosecution may be brought against a corporation (h) aggregate or an incorporated company, and such a corporation or company being liable as a person for a malicious prosecution, the ordinary doctrines as to the responsibility of principals acting by agents or servants apply (i) the jury having to say whether an act done by an agent or servant of either was within the scope of his authority or the course of his employment (i)

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Where therefore it is sought to make such a corporation or company liable for a malicious prosecution undertaken by its servant or agent the malice or indirect motive which a plaintiff will have to prove (j) may be that of the servant or agent if it be shown that he was acting within the scope of his employment (k)

### SECT 3—Remedy for Malicious Prosecution

#### SUB SECT 1—The Former Mode of Redress

1441 A person aggrieved by a malicious prosecution formerly sought redress, according to the circumstances by (1) a writ of conspiracy (l) or (2) an action on the case (m)

Writ of  
conspiracy

39 *American Reports* 606 *Boogher v Life Association of America* (1882) 42 *American Reports* 413 As to action against a trade union and one of its officials see *Bussey v The Amalgamated Society of Railway Servants and Bell* (1908) 24 T L R 437 and title FRADL AND TRADE UNIONS

(h) *Whitfield v South Eastern Rail Co* (1858) E B & L 115 (libel) *Green v London General Omnibus Co* (1859) 7 C B (N S) 290 (intentional acts of misfeasance by company's servant) *Walker v South Eastern Rail Co Smith v Same* (1810) L R 5 C P 640 *Bank of New South Wales v Owston* (1819) 4 App Cas 270 282 P O (where defendant's counsel admitted liability of a corporation to such an action) *Edwards v Midland Rail Co* (1880) 6 Q B D 287 (where FRY J refused to follow *Stevens v Midland Counties Rail Co* (1854) 10 Exch 352) *Kent v Courage & Co Croft v Same* (1890) 55 J P 264 *Cornford v Carlton Bank* [1899] 1 Q B 392 affirmed [1900] 1 Q B 22 C A (liability to action admitted by defendant's counsel) see also *Citizens Life Assurance Co v Brown* [1904] A C 423 P O (malicious libel) *Yarborough v Bank of England* (1812) 16 East 6 (trover) *Eastern Counties Rail Co v Broom* (1851) 6 Exch 314 Ex Ch (assault and battery) *R v Tyler and International Commercial Co* [1891] 2 Q B 588 C A *Rayson v South London Tramways Co*, [1893] 2 Q B 304 C A and see further titles COMPANIES Vol V pp 309 et seq CORPORATIONS Vol VIII pp 356 et seq

(i) *Citizens Life Assurance Co v Brown* [1904] A C 423 P O

(j) As to malice see p 679 post

(k) Thus it is submitted is clear from the authorities see *Citizens Life Assurance Co v Brown supra* (libel) citing *Barwick v English Joint Stock Bank* (1867) 1 R 2 Fxch 259 Ex Ch although in *Nevill v Fine Arts and General Insurance Co* [1895] 2 Q B 156 C A the Court of Appeal and the House of Lords [1897] A C 68 left open the question whether in an action of libel against a corporation a plea of privilege could be rebutted by proving actual malice in the mind of the agent who published the libel see also *Glasgow Corporation v Liversidge* [1911] A C 209 and for further information as to the cases cited see title AND SLANDER, Vol XVIII pp 663 note (f), 680 note (b) 713, note (r)

(l) A writ of conspiracy was directed to the sheriff, and commanded him on getting security from A, to bring before the court, for the purpose of showing cause two or more persons who had conspired together and falsely and maliciously procured the indictment of A, who was afterwards acquitted, to his damage and contrary to the ordinance in such case provided (Fitz. Nat Brev

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Defects in  
writ of  
conspiracy

Writs of conspiracy as a means of obtaining redress for malicious prosecution gradually, by reason of their inherent defects, fell into disuse, and were replaced by actions on the case in the nature of a conspiracy (*n*)

These defects were as follows —(1) A writ of conspiracy did not lie against an individual for one person cannot conspire with himself (*o*), (2) if on such writ one of two defendants were acquitted no judgment could be given against the other (*p*) (3) conspiracy lay only for procuring a person to be indicted for treason or felony where life was in danger (*q*) and (4) was only available where the aggrieved party had been acquitted and so could not be used in a case where an indictment was ignored by a grand jury (*r*)

SUB SECT 2—*Action for Malicious Prosecution*

Replacement  
of writ of  
conspiracy by  
action on the  
case.

**1442** An action for malicious prosecution or to give it its earlier designation, an action on the case in the nature of a writ of conspiracy lay in respect of a malicious prosecution for any crime whether capital or not and though the prosecution did not proceed to actual indictment or appeal (*s*) Again such an action lay against one of two persons charged with conspiracy (the other having obtained a verdict in his favour (*a*)) though in such circumstances a writ of conspiracy would have failed (*b*) and further the fact that the prosecution came to an end by reason of a defect in the indictment (*c*) or by reason of the grand jury throwing out the indictment (*d*) did not affect the remedy by action on the case

115) The ordinance referred to is the Statute of Conspirators (1305) 33 Edw 1 by which conspirators include amongst others persons who bind themselves to aid one another in indicting anyone or in causing him to be indicted or in falsely moving and maintaining pleas A slightly different form of writ used in case of nonsuit on an appeal of felony or murder commanded the sheriff on getting security as before mentioned to bring before the court for the purpose of showing cause two or more persons who had conspired together and falsely and maliciously procured A to be appealed of the death of B or of some other felony and to be imprisoned therefor until having been brought before the court he was acquitted (Fitz Nat Brev 115)

(*m*) Fitz Nat Brev 114D The foundation of the two proceedings was the same but the number of the defendants determined which method of action should be used (*Savile v Roberts* (1698) 1 Ld Raym 374 and see title ACTION Vol I p 41)

(*n*) *Coxe v Werrall* (1607) Cro Jac 193 see the text *infra*

(*o*) *Coxe v Werrall supra* *Smith v Cranshaw* (1626) W Jo 93

(*p*) *Savile v Roberts supra* at p 379 But if the writ were in respect of an indictment for something less than treason or felony judgment might be given against one though the other was acquitted (*ibid*)

(*q*) *Savile v Roberts supra*

(*r*) *Smith v Cranshaw supra*

(*s*) 1 Hawk P C 8th ed c 27 s 5 (conspiracy)

(*a*) *Price v Crofts* (1657) T Raym 180 *Pollard v Evans* (1679) 2 Show, 50 *Subley v Mott* (1748) 1 Wils 210

(*b*) *Savile v Roberts supra* and see note (*p*) *supra* \*

(*c*) *Chamberlaine v Robinson* (1728) 1 Stra 691 *Wicks v Fentham* (1794) 4 Term Rep 247, *Puppet v Hearn* (1822) 5 B & Ald 684

(*d*) *The Poulterers' Case* (1610), 9 Co Rep 50 b, *Payn v Porter* (1618), Cro Jac 490, Ex. Ch. \*

SECT 4—*Essentials to an Action for Malicious Prosecution*

SUB SECT 1.—*In General*

**1443** To succeed in an action for malicious prosecution (e) a plaintiff must prove

(1) the prosecution by the defendant of a criminal charge (f) against the plaintiff before a tribunal into whose proceedings the civil courts are competent to inquire (g)

(ii) that the proceedings complained of terminated in his favour if from their nature they were capable of so terminating (h)

(iii) that the defendant instituted or carried on such proceedings maliciously (i)

(iv) that there was an absence of reasonable and probable cause for such proceedings (j) and

(v) that the plaintiff has suffered damage unless indeed the proceedings necessarily import damage to his fame or person (k). This requirement has important consequences with reference to civil proceedings maliciously undertaken (l).

SUB SECT 2—*Termination of Proceedings in Plaintiff's Favour*

**1444** In an action for malicious prosecution it must be alleged and proved that the proceedings have terminated in the plaintiff's favour if from their nature they were capable of so terminating as in the absence of proof thereof a court entertaining the action would in effect constitute itself a court of appeal from the court in which the prosecution took place (m).

The rule prevails even in cases where the proceedings complained of have taken place abroad, provided that the court had

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tion.

Essentials to  
the action

Proceedings  
must have so  
terminated if  
capable of so  
terminating

Proceedings  
abroad.

(e) An action for malicious prosecution may be brought in a county court where the damage claimed does not exceed £100 see title COUNTY COURTS Vol VIII p 428

(f) See p 670 *ante*. As to abuse of civil proceedings see p 689 *post*

(g) As to naval and military courts see p 672 *ante*

(h) *Vanderbergh v Blake* (1661) Hard 194 *Steward v Gromett* (1859) 7 O B (N S) 191 as to which compare Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 20 *Basché v Matthews* (1867) L R 2 O P 684 see also *Bynoe v Bank of England* [1902] 1 K B 467 O A and the text *infra*

(i) *Purcell v M'Namara* (1808) 1 Camp 199 9 East 361 *Mitchell Jenkins* (1833) 5 B & Ad 588

(j) *Farmer v Darling* (1766) 4 Burr 1971 *Broad v Ham* (1839) 6 Bing (N C) 722 *Abraham v North Eastern Rail Co* (1883) 11 Q B D 440 O A *Bradshaw v Goodwin & Co* (1894) 10 T L R 491, O A and see further, pp 680 685 *post*

(k) See and compare *Savile v Roberts* (1698) 1 Ld Raym 374 *Byne v Moore* (1813) 5 Taunt 187 *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q B D 674, O A (a case of malicious civil proceedings) As to damages see further p 688 *post*

(l) See p 689 *post*

(m) *Vanderbergh v Blake supra* *Parker v Langley* (1714) 10 Mod Rep 209 210 *Lewis v Farrel* (1718), 1 Stra 114 *Castricus v Behrens* (1861) 3 E & E 709 721 *Whitworth v Hall* (1831) 2 B & Ad 695 *Bynoe v Bank of England supra*, *Redway v McAndrew* (1873), L R 9 Q B 74 (sufficiency of allegation of termination of proceedings), compare *Barber v Lenter* (1859), 7 O B (N S) 175, 187



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**tion**

When  
proceedings so  
terminate

Power to  
appeal

Effect of  
successful  
appeal

jurisdiction to entertain them, and that the decision was arrived at in such circumstances as to be binding in this country (n)

It is immaterial that the party convicted had no power of appealing (o)

**1445** The proceedings sufficiently terminate in the plaintiff's favour if the magistrate dismisses the charge (p) if the grand jury ignore the indictment (q) if the proceedings fail through a defect in the indictment (r) or because they are *coram non iudice* (s), or by the acquittal of a jury (t), even as to one part of the indictment (a)

Where an appeal lies from a conviction and no appeal has been made by the party convicted, the proceedings of course, have not terminated in his favour, and his acquiescence in the conviction is evidence of reasonable and probable cause (b)

Where there has been a successful appeal from a conviction this would be for the purpose of pleading, a sufficient termination of the proceedings in a plaintiff's favour (c) But it seems the conviction though reversed, might be evidence on which the judge might find that there was reasonable and probable cause for the prosecution (d)

(n) *Castrique v Behrens* (1861) 3 E & E 709 721 (a case of civil proceedings) the same principle would no doubt be applied to a prosecution in a foreign court see also *Taylor v Ford* (1873) 29 L T 392 The principle has been applied in the case of a malicious presentment in an Ecclesiastical Court (*Fisher v Bristow* (1799) 1 Doug (K B) 210)

(o) *Baséché v Matthews* (1867) L R 2 O P 684 *Bynne v Bank of England* [1902] 1 K B 467 C A

(p) *Delejal v Hingley* (1837) 3 Bing (N C) 950

(q) *Jones v Gwynn* (1714) 10 Mod Rep 214 at p 220 *Morgan v Hughes* (1788) 2 Term Rep 225 In an early case where the plaintiff proved nothing more than that an indictment was preferred on which nothing was done his action failed because it did not appear that the proceedings had terminated in his favour or at all (*Arundell v Iregona* (1607) Yelv 116)

(r) *Savile v Roberts* (1698) 1 Ld Raym 374 *Jones v Gwynn supra* at p 214 *Wicks v Fentham* (1791) 4 Term Rep 247 *Pippet v Hearn* (1822) 5 B & Ald 634

(s) *Jones v Gwynn supra* at p 220

(t) *Morgan v Hughes* (1788) 2 Term Rep 225 As to evidence of an acquittal see p 683 *post*

(a) *Boaler v Holder* (1887) 51 J P 277 where plaintiff was indicted for publishing a libel knowing it to be false and convicted of publishing it only and see *Boaler v Holder* (1886) 54 L T 298 (on objection to statement of claim) See also as to termination of proceedings in plaintiff's favour *Pierce v Street* (1832) 1 L J (K B) 147 where proceedings in an action in which there had been a malicious arrest were abandoned *Craig v Hasell* (1848) 4 Q B 481 (writ of extent under which plaintiff's goods had been seized set aside, though by arrangement)

(b) *Mellor v Baddeley* (1834) 2 Cr & M 670 678

(c) See *Mellor v Baddeley supra* *Castrique v Behrens supra*

(d) See *Reynolds v Kennedy* (1748) 1 Wils 232 as explained in *Sutton v Johnstone* (1786) 1 Term Rep 493 at p 505 In the earlier of these cases it was held that malice could not be inferred as the original tribunal gave judgment for the defendants but in the later it was said that it would have been more correct if the court had ruled that that fact enabled it to hold that there was reasonable and probable cause see also *Craig v Hasell supra*, at p 492 The American authorities vary but on the whole tend to show that the original conviction, subsequently reversed, is only *prima facie* evidence of reasonable and probable cause, see *Whitney v Peckham* (1818) 15 Massachusetts 243 (conviction though reversed conclusive evidence of reasonable and probable cause) *Burt v Place* (1830) 4 Wendell's Reports 691 (not conclusive where

It was at one time held that the entry by the Attorney General of a *nolle prosequi* to an indictment would not be a sufficient termination of the proceedings in favour of the accused to enable him to bring an action (e). But the current of modern authority seems opposed to this (f). A *nolle prosequi* is not a decision on the merits (g) but it puts an end at least to the particular prosecution before the court (h).

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**Malicious**  
**Prosecu**  
**tion**

**1446** The proceedings complained of need not for the purpose of an action for malicious prosecution, have terminated favourably for the plaintiff if from their nature, they could not have so terminated (i), as for instance where on motion made in the High Court and supported by affidavit a person is ordered to find security upon articles of the peace exhibited against him for on such motion he cannot contradict the allegations in the affidavit (k).

Effect of  
entry of *nolle*  
*prosequi*  
Proceedings  
need not so  
terminate if  
not capable of  
so termi  
nating

**SUB SECT 3—Malice**

**1447** The malice which a plaintiff in an action for malicious prosecution or other abuse of legal proceedings has to prove is not

The malice  
must be  
malice in fact

prosecutor knew of plaintiff's innocence and prevented him from establishing it) *Witham v Gouen* (1837) 14 Maine 362 (conclusive unless plaintiff proves that conviction was obtained exclusively or mainly by defendant's false testimony) *Mayer v Walter* (1810) 64 Pennsylvania State Reports 263 (no bar to an action in which plaintiff can prove malice and absence of reasonable and probable cause).

(e) *Goddard v Smith* (1804) 6 Mod Rep 261 see Buller Law of Nisi Prius 5th ed 14

(f) In the Supreme Court of New South Wales it has been held that a *nolle prosequi* by the Attorney General or a refusal to continue a prosecution actually commenced is a sufficient termination for the purposes above mentioned (*Gilchrist v Gardner* (1891) 12 New South Wales Law Reports (Cases at Law) 184 See also *Reed v Hales* (1812) 11 Supreme Court of New South Wales Reports (Cases at Law) 317 where the prosecution was withdrawn on the suggestion of the judge). In America the question has been much discussed and there are conflicting views but it would seem that the prevailing opinion is that a *nolle prosequi* is a sufficient termination of the proceedings (see *Chapman v Woods* (1843) 6 Blackford 504 *Clark v Cleveland* (1844) 6 Hill 344 347 *Hays v Blizzard* (1868) 30 Indiana 457 *Brown v Randall* (1869) 4 American Reports 35 *Stanton v Hart* (1873) 27 Michigan 539 but compare *Bacon v Towne* (1849) 4 Cushing 217 *Farley v Farley* (1852) 10 Cushing 279 *Brown v Lakeman* (1853) 12 Cushing 482 *Cardinal v Smith* (1812) 12 American Reports 682).

(g) *Goddard v Smith supra* *R v Rudpath* (1713) 10 Mod Rep 102

(h) *R v Allen* (1862) 1 B & S 850 see title CRIMINAL LAW AND PROCEDURE Vol IX p 357 see also and compare *R v Mitchel* (1848) 3 Cox C C 93 Crown Office Rules 1906 Form 120 (entry of *nolle prosequi*).

(i) *Steward v Gromett* (1859) 7 C B (N S) 191 see title STOPPEL Vol XIII p 360

(k) *Vane's (Lord) Case* (1744) 2 Str 1202 *R v Doherty* (1810) 13 East 171 *Parton v Hull* (1864) 12 W R 753 at p 754 Crown Office Rules 1906 rr 250 251 compare *Brassey v McLean* (1876), L R 6 P C 398 (action against sheriff for false return of rescue upon which not being traversable a rule absolute for attachment is granted in the first instance). So where under the old practice on *ex parte* proceedings before magistrates a person was committed to prison in default of finding sureties for the peace he was not debarred from bringing an action (*Steward v Gromett supra* *Venafra v Johnson* (1833) 10 Bing 301). But now by the Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 25 both parties in the proceedings before the magistrates may be examined and cross-examined, see title MAGISTRATES p 634 ante.

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malice in its legal sense, that is such as may be assumed from a wrongful act done intentionally, without just cause or excuse (l) but malice in fact—*malus animus*—indicating that the defendant was actuated either by spite or illwill against the plaintiff, or by indirect or improper motives (m) In this respect the improper resort to legal proceedings is an exception to the rule that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (n)

**Comparison**  
**between**  
**malicious**  
**prosecution**  
**and libel**

**1448** With regard to malice, a comparison has been drawn between actions for libel and for malicious prosecution A libel is excused if the words complained of were written on a privileged occasion but if there is express malice the excuse fails and the privilege is no longer a protection So the law protects a prosecutor though there is no reasonable and probable cause for the prosecution but if in such case malice is proved an action lies, not indeed for the malice but for the annoyance, expense, and disgrace of the groundless prosecution (o)

**Question for**  
**the jury**

**1449** The question of malice or no malice is for the jury, and not for the judge, and the judge should leave it to them in express terms (p)

**SUB SECT 4 —Want of Reasonable and Probable Cause**

**Question one**  
**of law and**  
**fact**

**1450** Whether there was reasonable and probable cause for a prosecution or not is a mixed question of law and fact the province

- (l) See *Bromage v Prosser* (1825) 4 B & C 247 250  
(m) *Hicks v Faulkner* (1878) 8 Q. B. D. 167 175 see also *Mitchell v Jenkins* (1833) 5 B. & Ad. 588 589 *Haddrick v Heslop* (1848) 12 Q. B. 267 (prosecution for perjury to stop plaintiff's mouth) *Stevens v Midland Counties Rail Co* (1854) 10 Exch. 352 (where defendants' object was to punish some one in order to deter others) *Abraath v North Eastern Rail Co* (1883) 11 Q. B. D. 440 455 C. A. affirmed (1886) 11 App. Cas. 247 *Brown v Hawkes* [1891] 2 Q. B. 718 722 728 (C. A. see *Corea v Peiris* [1909] A. C. 549 P. O.)  
(n) *Stevenson v Newnham* (1853) 13 C. B. 295 297 Ex. Ch. approved in *Allen v Flood* [1898] A. C. 1 *per* Lord HERSCHELL at p. 124 (and see S. C. *per* Lord DAVEY at p. 172) and in *Quinn v Leatham* [1901] A. C. 495 *per* Lord MACNAGHTEN at p. 508 and see S. C. *per* Lord LINDLEY at p. 533 see also *Chaffers v Goldsmid* [1894] 1 Q. B. 186 *per* WILLS J., at p. 191 *Fitzroy v Cate* [1905] 2 K. B. 364 C. A. *per* COLLINS M. R. at p. 360 The *dicta* to the contrary in *Bowen v Hall* (1881) 6 Q. B. D. 333 338 C. A. and *Temperton v Russell* [1893] 1 Q. B. 715 728 C. A. can no longer be relied on as an authority On the general question whether and how far malice or bad intention will give a cause of action where it would not otherwise exist see in addition to the above cases *Mogul Steamship Co v McGregor Gow & Co* (1889) 23 Q. B. D. 598 C. A. especially the judgment of BOWEN L. J. at pp. 611 *et seq.* affirmed [1892] A. C. 25 (see *per* Lord FIELD at p. 51) *Read v Friendly Society of Operative Stonemasons of England Ireland and Wales* [1902] 2 K. B. 732 739 C. A. *Bradford Corporation v Pickles* [1895] A. C. 587 *Davis v Bromley Corporation* (1907) 24 T. L. R. 11 C. A. and the judgments in *Glamorgan Coal Co v South Wales Miners Federation* [1903] 2 K. B. 545 C. A. affirmed [1905] A. C. 239 See also titles TORT TRADE AND TRADE UNIONS  
(o) *Allen v Flood supra per* Lord DAVEY at p. 172 see also S. C. *per* Lord HERSCHELL at pp. 125, 126 *Quinn v Leatham supra per* Lord BRAMPTON at p. 524 Proof of malice is also essential to an action for abuse of civil process see p. 691 *post*  
(p) *Mitchell v Jenkins supra*, *Payne v Revans* (1861), 8 W. R. 899, *Hicks v. Faulkner, supra*.

of the jury being to find the facts unless admitted (g), including the inferences therefrom (r), and that of the judge to say whether such facts amount to reasonable and probable cause (a)

**1451** Reasonable cause has been said to be such as would operate on the mind of a discreet man, and probable cause such as would operate on the mind of a reasonable man

It must also be such as would operate on the mind of the defendant otherwise there is no reasonable cause for him (b) It follows that, at least when the accused was in fact innocent (c) belief in his guilt is essential to the existence of reasonable and probable cause (d), and that such belief must be based on grounds which or some of which (e), are reasonable (f) and arrived at after due inquiry (g)

**1452** The question of reasonable and probable cause does not depend upon the actual existence but upon a reasonable *bona fide*

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Definition  
and nature

Upon what  
the existence  
of reasonable  
or probable  
cause depends

(g) *Pain v Rochester* (1602) Cro Eliz 811 *Core v Harrall* (1601) Cro Jac 193 *Panton v Williams* (1841) 2 Q B 169 192 Ex Ch *Chapman v Heslop* (1853) 2 W R 74 Ex Ch *Hillier v Dade* (1895) 14 T L R 334 C A

(r) *Panton v Williams supra* *Taylor v Williams* (1811) 2 B & Ad 845

(a) *Johnstone v Sutton* (1766) 1 Term Rep 510 510 545 Ex Ch *Broul v Ham* (1839) 5 Bing (N C) 122 *Panton v Williams supra* *Watson v Whitmore* (1844) 14 L J (Ex) 41 *Hicks v Faulkner* (1878) 8 Q B D 167 *Brown v Hawkes* [1891] 2 Q B 718 C A and see *Gibbons v Alston* (1846) 3 C B 181 (civil proceedings) It on undisputed facts the judge holds that there was reasonable and probable cause there will be no case for the jury and plaintiff must fail (*Blachford v Dold* (1831) 2 B & Ad 119 *Davis v Hardy* (1827) 6 B & C 225) There may be cases where the question of reasonable and probable cause being a mixed one of law and fact the judge may leave it to the jury (*M Donald v Cooke* (1835) 2 Bing (N C) 217) See further *Watson v Smith* (1899) 15 F L R 473 C A *Cox v English Scottish and Australian Bank* [1905] A C 168 and title EVIDENCE Vol XIII p 431

(b) *Broad v Ham supra* per LINDAL C J at p 725 and see *Hicks v Faulkner supra*

(c) When the jury are satisfied that the plaintiff though acquitted was in fact guilty of the charge complained of the defendant's belief seems to be immaterial (*Heslop v Chapman* (1853) 23 L J (Q B) 49 52 Lx Ch and cases cited at p 686 *post*)

(d) *Broad v Ham supra* *Hinton v Heather* (1845) 14 M & W 131 *Turner v Ambler* (1847) 10 Q B 252 *Haddrell v Heslop* (1848) 12 Q B 267 214 *Heslop v Chapman supra* *Ravenga v Mackintosh* (1824) 2 B & C 693 *Williams v Banks* (1859) 1 L & L 551 *Johnson v Emerson* (1811) L R 6 Exch 329 351 *Shrobsbery v Osmaston* (1817) 3 L T 792 compare *Bail of New South Wales v Paper* [1891] A C 383 P C (where as plaintiff plainly knew that he had committed the offence for which he was prosecuted it was held unnecessary to ask the jury if the defendant had an honest belief in the plaintiff's guilt) see p 686 *post* A person who on the strength of circumstances of grave suspicion which are insufficient to convince him of the guilt of the person concerned institutes an unsuccessful prosecution under a sense of public duty would have a defence to an action of malicious prosecution not because there was reasonable and probable cause but because he could negative malice (*Shrobsbery v Osmaston supra* per LINDLEY J at p 795)

(e) *Hasles v Marks* (1861) 7 H & N 56

(f) *Hicks v Faulkner supra* and see *Mitchell v Williams* (1843) 11 M & W 205 *Douglas v Corbett* (1856) 6 E & B 511

(g) *Lester v Perryman* (1810) L R 4 H L 521, *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q B D 674 C A *Abrath v North Eastern Rail Co* (1883) 11 Q B D 440 C A, affirmed (1886) 11 App Cas 247, *Brown v Hawkes* [1891] 2 Q B 718 C A *Kelly v Midland Great Western of Ireland Rail Co* (1872) 7 L R C L 8 *Springett v London and South-Western Bank* (1886) 1 T L R 611, *Vagg v Kemp* (1887) 4 T. L. R. 51

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belief in the existence of such facts as would justify a prosecution (h) This belief, or the belief in the accused's guilt, may arise out of the recollection of the prosecutor if he has always found his memory trustworthy (i) or out of information furnished to him by others and accepted by him as true (k)

There may be reasonable and probable cause for preferring a criminal charge though the prosecutor has before him only *prima facie* evidence (l), or such as would not be admissible before a jury (m), and the question will be whether the impression produced on the mind of the prosecutor by the facts before him was such as would be produced on the mind not of a lawyer, but of a discreet and reasonable man (n)

The facts must be known to the prosecutor at the time of prosecution

**1453** The existence of reasonable and probable cause is not sufficient unless the facts which constituted it were known to the prosecutor at the time of the prosecution (o) but if he did know those facts the benefit of such knowledge will not be displaced by the subsequent communication of some other fact which, though it might affect the mind of a reasonable man, does not alter the facts already known to him (p)

**SECT 5 — Evidence in an Action for Malicious Prosecution**

**SUB SECT 1 — In General**

What matters must be established

**1454** The evidence to be adduced at the trial of an action for malicious prosecution must establish the several matters before enumerated (q)

(h) *Hicks v Faulkner* (1878) 8 Q B D 167 173 It will be assumed until the contrary is shown that the prosecutor before prosecuting was acquainted with the substance of the evidence which his witnesses afterwards gave (*Hall v South Eastern Rail Co Smith v Same* (1810) L R 3 C P 640 644)

(i) *Hicks v Faulkner supra*

(k) *Hicks v Faulkner supra Lister v Perryman* (1870) L R 4 H L 521 536 538 As to the defendant's right to act upon reliable hearsay evidence see *Chatfield v Comerford* (1866) 4 F & F 1008 *Gibson v Veasey* (1867) 15 L T 586 *Lister v Perryman supra* Omission to sift information which appears to be suspicious may be evidence of the want of reasonable and probable cause (*Lister v Perryman supra Brown v Haukes* [1891] 2 Q B 718 728 C A) and see p 656 *post*

(l) *Dawson v Vansandau* (1863) 11 W R 516

(m) *Hicks v Faulkner supra* and cases cited in note (k) *supra*

(n) *Lister v Perryman supra Kelly v Midland Great Western of Ireland Rail Co* (1872) 7 L R 8 see and compare *Lowe v Collum* (1877) 2 L R Ir 10

(o) *Delegat v Highley* (1837) 3 Bing (N C) 900 *Furner v Ambler* (1841) 10 Q B 252 *Healop v Chapman* (1803) 23 L J (Q B) 49 Ex Ch *Johnson v Emerson* (1871) L R 8 Fich 329 332 If it then existed the burden of proof would be on plaintiff to show that the defendant did not know of it (*Brooks v Blain* (1869) 39 L J (Q B) 1)

(p) *Musgrove v Newell* (1836) 1 M & W 582 (representations as to good character of persons accused) see also *Harrison v National Provincial Bank of England* (1886) 11 T L R 300 affirmed 2 T L R 70 C A

(q) See p 677 *ante*. In addition to showing that the prosecution terminated in his favour it has been said that the plaintiff must show that he was innocent see *Abrath v North Eastern Rail Co* (1883) 11 Q B D 440 C A at pp 455, 462, *per BOWEN L J*, (*S O* (1886) 11 App Cas 247), see also *Healop v Chapman supra*, *Bank of New South Wales v Piper* [1897] A C 383 P C but compare *Williams v Banks* (1859) 1 F & F 567 *Haddrick v Healop* (1848) 12 Q B 267, 274, *Shrobsbery v Osmaston* (1877) 37 L T 792, and see p. 656, *post*.

**1455** Where it is necessary to prove the trial and conviction or acquittal (r) of a person charged with an indictable offence, the record or a copy of it need not be produced but it is sufficient to produce what purports to be a certificate under the hand of the clerk of the court or other officer who has charge of the records of the court, or of the deputy of either, of the indictment trial conviction or acquittal (s)

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**1456** Where the action is brought in respect of a charge made before magistrates it is usual to serve the magistrates clerk with a *subpoena duces tecum* to produce the proceedings including the written information (if any) laid by the defendant the warrant (if any), and the order of dismissal (t)

Proof of trial  
and  
conviction or  
acquittal  
Proof of  
magistrates  
order

#### SUB SECT 2—Burden of Proof

**1457** The burden of proof (u) in an action for malicious prosecution lies in the first instance on the plaintiff. It is not sufficient for him to prove that he was innocent of the crime for which he was prosecuted by the defendant and that the prosecution terminated in his favour. He must also show that the defendant acted maliciously and without reasonable and probable cause (v)

Burden lies  
on plaintiff in  
first instance

**1458** If want of reasonable care on the part of the defendant is relied upon that as an element in the absence of reasonable and probable cause must be proved by the plaintiff (u) and so if facts

Proof of want  
of reasonable  
care or  
absence of  
knowledge

(r) Some difficulty was at one time experienced in the proof of a prosecution and of its determination by reason of an order made in the time of Charles II by five judges at the Old Bailey that copies of an indictment for felony should only be given after order made on motion in open court at the general gaol delivery (1 Wm Bl 2nd ed 385, n). The Old Bailey order however did not apply to prosecution for misdemeanour (*Morrison v Kelly* (162) 1 Wm Bl 385 where the clerk of the sessions attended with the original record) and even in cases of felony if the plaintiff in an action for malicious prosecution produced a copy of the indictment though he had got no order for it the court would receive it (*Jordan v Peiris* (1739) 2 Stra 112<sup>o</sup> *Legatt v Lollervey* (1811) 14 East 302). In *R v Brangan* (142) 1 Leach 2, WILLE CJ refused to make an order on the ground that every prisoner had on his acquittal a right to a copy of the record thereof for any use he might think fit to make of it see also *Re Bowman* *R v Middlesex Justices* (1834) 6 B & Ad 1113.

(s) Evidence Act 1851 (14 & 15 Vict c 99) s 13. In *Freeman v Arlell* (1824) 1 C & P 13, the deputy clerk of the peace produced the indictment which was ignored and a member of the grand jury gave evidence that the defendant was the prosecutor compare *Sykes v Dunbar* (1899) 2 Selwyn Law of Nisi Prius 13th ed 101; see also title EVIDENCE Vol XIII p 500.

(t) 2 Selwyn Law of Nisi Prius 1014 see also *Freeman v Arlell* (1824) 2 B & C 494 (where a magistrate gave evidence). An action may lie though the charge was not taken down in writing (*Clarke v Postan* (1834) 6 C & P 423). As to proceedings before magistrates see title MAGISTRATES pp 531 *et seq ante*.

(u) See generally title EVIDENCE Vol XIII pp 433 *et seq*.

(v) See *Corea v Peiris* [1909] A C 549.

(w) *Abraham v North Eastern Rail Co* (1883) 11 Q B D 440 C A (1886), 11 App Cas 247. It was there said that the want of reasonable care on the part of the prosecutor to inform himself of the true state of the case was a fundamental fact in the determination of the question of reasonable and probable cause as distinguished from mere evidence of it per BRETT M.R. at pp 450 451. See also per BOWEN L.J. at p 460. Lord BRAMWELL however, doubted this, S C (1886), 11 App Cas 247 at p 254. Interrogatories as to the grounds

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tion.

When burden  
shifted  
When burden  
satisfied

existed which if known to the defendant, would have constituted reasonable and probable cause the burden of showing that they were not known to him would be on the plaintiff (a) But the burden of proof is not stationary When the plaintiff has given such evidence as, if not answered will entitle him to a verdict, the burden of proof is shifted to the defendant (b)

If the plaintiff gives evidence that as to some only of several charges on which he was prosecuted the defendant acted maliciously and without reasonable and probable cause, the defendant will not be allowed to prove that as to other charges contained in the same indictment there was reasonable and probable cause (c)

SUB SECT 3—Evidence of Malice

When it may  
be implied  
from want of  
reasonable or  
probable  
cause

**1459** Malice may be implied from the want of reasonable and probable cause if the jury agree with the judge that the facts establish this (d) But if there is no other evidence of malice than what in the judge's opinion establishes a want of reasonable and probable cause the jury upon the question of malice are not bound by that opinion but may determine for themselves whether there was a want of reasonable and probable cause (e) If the defendant, in prosecuting the plaintiff, honestly believed in his guilt the jury should not infer malice if the only evidence of it is the absence of reasonable and probable cause (f)

Further cases  
in which  
malice may  
be inferred

**1460** Where the justification alleged for a prosecution shows a gross ignorance of law malice may be inferred by the jury (g)

Again the advertising of the indictment by the defendant is evidence of malice (h) and so is improper conduct on his part in substantiating it (i)

Where the prosecutor knows that the accused is innocent there is of course clear evidence of malice and the fact that he was

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which defendant had for instituting the prosecution are not as a rule allowed (*Mac v Gas Light and Coke Co* [1911] 2 K B 543 C A)

(a) *B v Cook v Blain* (1869) 39 L J (C P) 1

(b) *Abrath v North Eastern Rail Co* (1883) 11 Q B D 440 456 C A (1886) 11 App Cas 247

(c) *Ellis v Abrahams* (1846) 8 Q B 709 and see *Reed v Taylor* (1812) 4 Taunt 616 *Talmer v Birmingham Manufacturing Co* (1902) 18 T L R 552 and cases cited at p 686 post

(d) *Johnstone v Sutton* (1786) 1 Term Rep 510 at p 540 Ex Ch *Mitchell v Jenkins* (1833) 5 B & Ad 588 *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q B D 674 C A *Parrott v Fishwick* (1772) 9 East 362 n As to malice see further, p 679 ante

(e) *Quartz Hill Gold Mining Co v Eyre* supra at p 687 per BRETT M R approving *Hucks v Faulkner* (1878) 8 Q B D 167 at pp 174 175

(f) *Brown v Hawkes* [1891] 2 Q B 718 C A see *Stewart v Beaumont* (1866) 4 F & F 1034

(g) *Brooks v Warwick* (1818) 2 Stark 389 compare *Snow v Allen* (1816) 1 Stark 502 (where defendant was advised by his solicitor on the authority of a reported case that he was acting rightly)

(h) *Chambers v Robinson* (1726) 1 Stra 691

(i) *Caddy v Barlow* (1827) 1 Man & Ry (K B) 275 *Edgell v Francis* (1840) 1 Man & G 222, *Stevens v Midland Counties Rail Co* (1854), 10 Exch 352 (where the prosecutor in applying for a warrant for the plaintiff's arrest stated that he desired to punish some one so as to deter others) *Heath v Hemp* (1856), 1 H. & N. 475

bound on his recognisances to prosecute will be no answer to an action (k)

**1461** The mere fact that the plaintiff was acquitted for want of prosecution does not prove malice (l) and so, where under the old practice one person had arrested another for debt but omitted to proceed with the action to recover the debt, malice was not proved by the omission (m)

**1462** The defendant on his part may give evidence of all the facts that were before his mind at the time of the prosecution whether for the purpose of negating malice or of establishing reasonable and probable cause (n)

SUB SECT 4—*Evidence of Absence of Reasonable and Probable Cause*

**1463** The plaintiff in proving the absence of reasonable and probable cause has to prove a negative, and in general need only give slight evidence of such absence (a)

But it cannot be inferred from the most express malice (b) \* The mere innocence of the plaintiff is not *prima facie* proof of such absence (c) and the fact that the indictment was thrown out by the grand jury (d) or that no indictment was preferred (e) or that the defendant did not give evidence at the trial though he was present in court (f) does not prove it

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Where malice  
not implied  
inferred by  
defendant.

Slight  
evidence only  
necessary

Facts which  
do not prove  
malice

(k) *Dubois v Keats* (1940) 11 Ad & El 329 *Fitzjohn v Mackinder* (1861) 9 C B (N S) 500 Possibly if in such a case he merely prefers a bill but gives no evidence in support of it he may not be liable see *Fitzjohn v Mackinder supra* at p 523 *Broune v Stradling* (1836) 5 L J (C P) 290

(l) *Purcell v Macnamara* (1808) 9 East 361 see also *Syles v Dunlar* (1799) 1 Camp 202 n

(m) *Sinclair v Eldred* (1811) 4 Taunt 7 compare *Nicholson v Coghill* (1825) 4 B & C 21 (where the first action was discontinued) *Webb v Hall* (1828) Mood & M 253

(n) *Thomas v Russell* (1854) 9 Exch 764 765 and see *Abrath v North Eastern Rail Co* (1884) 11 Q B D 440 C A (1886) 11 App Cas 247 The fact that the defendant relied on the opinion of counsel may afford a defence but only if the opinion was founded on a fair statement of the facts and was acted on *bona fide* (*Ravenga v Mackintosh* (1824) 2 B & C 693 *Hewlett v Cruchley* (1813) 5 Taunt 277 *Ienfield v Grosvenor Bank* (1886) 2 F L R 159 and see note (l) p 686 post and title BARRISTERS Vol II p 402) and see *Bostock v Ramsey Urban District Council* (1899) 16 T L R 18

(a) *Cotton v James* (1830) 1 B & Ad 128 *Taylor v Willans* (1831) 2 B & Ad 845 857 compare *Fish v Scott* (1792) Peake 184 [15] It would seem that the burden of proof is on plaintiff to put in the depositions (see *Lea v Charrington* (1889) 5 T L R 218 *Carder v Iennsular and Oriental Steam Navigation Co* (1892) 8 T L R 330) The defendant cannot rely on the depositions of the witnesses in his favour but must call the witnesses (*Jacks v Bull and Alson* (1838) 2 Mood & B 176)

(b) *Anon* (1703) 6 Mod Rep 73 *Johnstone v Sutton* (1786) 1 Term Rep 510 545 Ex Ch *Inclendon v Berry* (1805) 1 Camp 203 n *Lurner v Ambler* (1847) 10 Q B 252 *Hailes v Marks* (1861) 7 H & N 56 compare *Wright v Greenwood* (1853) 1 W R 393

(c) But the proof of innocence may involve with it other circumstances e.g. that the prosecutor knew that his evidence was false which would show that there was no reasonable and probable cause (*Abrath v North Eastern Rail Co, supra per Bowen* L J at p 462) See Buller Law of Nisi Prius 5th ed, 14.

(d) *Freeman v Arkell* (1823) 1 C & P 135 at p 138

(e) *Walls v Alwens* (1805) 1 Camp 204 n

(f) *Taylor v Willans supra* and see *Inclendon v Berry supra, Purcell v*



**SECT 5**  
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**tion**

Proof of  
 absence in  
 some charges  
 only  
 Disbelief in  
 plaintiff's  
 guilt as proof  
 of absence  
 Evidence of  
 absence where  
 prosecution  
 founded on  
 mere  
 suspicion  
 Proof of fact  
 that jury took  
 time to  
 consider

**1464.** It is sufficient for the plaintiff to show that there was no reasonable and probable cause for some of the charges in the indictment, though there may have been such cause for others (g)

**1465** If the facts before the defendant when prosecuting *prima facie* amounted to reasonable and probable cause, but the defendant did not believe the plaintiff to be guilty and he was not so in fact the want of such belief is evidence of the want of reasonable and probable cause (h) and is apparently conclusive (i), but the plaintiff must prove such disbelief if alleged (k)

Where a prosecutor had nothing before him but circumstances of mere suspicion (l), or where he knew that the acts on which the prosecution was founded were done openly and *bona fide* in assertion of a legal right, there is in general no reasonable and probable cause (m)

**1466** The fact that the jury took time to consider their verdict

*M Namara* (1808) 1 Camp 199 From this fact however a jury may in certain circumstances infer a want of reasonable and probable cause (*Taylor v Williams* (1831) 2 B & Ad 840 847 and see *Shufflebottom v Allday* (1857) 5 W R 315)

(g) *Reed v Taylor* (1812) 4 Taunt 616 *Fllis v Abrahams* (1846) 8 Q B 709 see also *R v Prosser* (undated) cited 1 Term Rep 533 *Delisser v Towns* (1841) 1 Q B 333 *Boaler v Holder* (1887) 55 J P 277 on objection to the statement of claim *Boaler v Holder* (1886) 54 L T 298 *Palmer v Birmingham Manufacturing Co* (1902) 18 T L R 502

(h) *Broad v Ham* (1829) 5 Bing (N o) 722

(i) *Shrobsbery v Osmaston* (1877) 37 L T 792 and cases cited note (d) p 681 ante and see note (k) *infra*

(k) *Turner v Ambler* (1847) 10 Q B 259 and see *Delegal v Highbly* (1837) 3 Bing (N o) 950 *Williams v Banks* (1809) 1 F & F 557 *Laster v Perryman* (1870) L R 4 H L 521 If however there was in fact reasonable and probable cause for the prosecution and the jury find that the plaintiff though he escaped conviction was guilty of the offence with which he was charged the defendant's belief in the innocence of the plaintiff might perhaps be held to be immaterial (*Heslop v Chapman* (1853) 23 L J (Q B) 49 Ex Ch) and see *Abrath v North Eastern Rail Co* (1883) 11 Q B D 440 450 C A (1886) 11 App Cas 247 *Banks of New South Wales v Piper* [1891] A C 383 P O compare *Williams v Banks supra* *Shrobsbery v Osmaston supra* note (q) p 682 ante As to the effect of taking counsel's opinion before the prosecution and acting on it see title BARRISTERS Vol II p 402 and p 680 ante See also *Phillips v Naylor* (1809) 4 H & N 565 Ex Ch (where defendant acted *bona fide* under a mistaken view of a doubtful point of law) *Johnson v Emerson* (1871) L R 6 Exch 329 *per* BRAMWELL B at p 365

(l) *Clements v Orlby* (1847) 2 Car & Kir 686 *Busst v Gibbons* (1861) 30 L J (EX) 75 compare *Marham v Pescod* (1606) Cro Jac 130 and see *Roberts v Orchard* (1863) 2 H & O 769 Ex Ch *Leets v Hart* (1868) L R 3 O P 322 *Chamberlain v King* (1871) 1 R 6 C P 474

(m) *Huntley v Semson* (1857) 2 H & N 600 *Colson v Radclyffe* (1887) 4 T L R 59 compare *Corea v Perris* [1909] A C 549 P O (where on the facts the defendant was held to have had reasonable and probable cause) *Wilkinson v Foote* (1856) 5 W R 22 As to the reputation of the plaintiff for honesty, see *Wilkinson v Foote supra* and see *Brooks v Warwick* (1818) 2 Stark 389 *James v Phelps* (1840) 11 Ad & EL 483 *Hinton v Heather* (1845) 14 M & W 131 (where defendant knew that he and not the plaintiff was in the wrong) *Ayres v Flborough* (1870) 22 L T 106 (balance sheet false but no evidence of fraud)

before acquitting an accused person is no proof of reasonable and probable cause (n)

**1467** Neither the observations of the judge at the trial of the indictment (o) nor the observations of the magistrate in dismissing a charge or of a jury in acquitting (p) can be used by the plaintiff as evidence (q)

**1468** Questions tending to show the plaintiff's bad character may be put to the plaintiff himself in cross examination (r)

#### SECT 6 — *Malicious Procurement of Issue of Search Warrant*

**1469** An action for the malicious procurement of the issue of a search warrant must be supported by evidence of a like kind to that required in the ordinary action for malicious prosecution

Where a person fairly and honestly lays the facts on which he relies and bases his suspicions before a magistrate and the magistrate thereupon orders the issue of a search warrant (which may be accompanied in some cases by an order to bring the suspected party before him (s)) he is not liable for the exercise of the magistrate's discretion (a)

But an action lies where a person falsely and maliciously, and without reasonable and probable cause procures to the damage of another person the issue of a search warrant (b) The application

**Evidence in an Action for Malicious Prosecution**

Matters which plaintiff cannot use as evidence.

Questions as to character What evidence is necessary

When action will not lie

When an action will lie.

(n) *Willans v Taylor* (1829) 3 Moo & P 350 *per PARK J* at p 365 not following *Smith v Macdonald* (1799) 3 Esp 7

(o) *Barker v Angell* (1841) 2 Mood & R 371 not following *Warne v Terry* (1806) *per LITTLEDALE J* there cited compare *King v Henderson* [1898] A C 720, 30 P C (reasons of registrar in bankruptcy) *Ldden v Thornloe* (1842) 6 Jur 265 following *Warne v Terry supra*

(p) *Hibberd v Charles* (1860) 2 F & F 126

(q) *Wetlar v Zachariah* (1861) 16 L T 432 compare *Richards v Turner* (1840) Car & M 414 *Ldden v Thornloe supra* (where the observations were admitted) On principle such observations would appear to be equally inadmissible for the defendant. Indeed the reasons given by MELLOR J in *Wetlar v Zachariah supra* (inability of the prisoner to reply) apply rather to evidence against the plaintiff than for him see *Brown v Foster* (1807) 1 H & N 736 (plaintiff's counsel at police court called by defendant at trial as to possible alteration by plaintiff during a remand of a book produced in evidence)

(r) See title EVIDENCE Vol XIII pp 419 *et seq*

(s) *Eg* where the application for a search warrant refers to goods suspected to have been stolen see the Larceny Act 1861 (24 & 25 Vict c 96) s 103 2 Hale P C 113 *Wyatt v White* (1860) 5 H & N 371 As to search warrants see title CRIMINAL LAW AND PROCEDURE Vol IX p 310

(a) *Hope v Evered* (1886) 17 Q B D 338 340 (application for a search warrant in respect of a female suspected of being detained for immoral purposes), see Criminal Law Amendment Act 1885 (48 & 49 Vict c 69) s 10 *Lea v Charrington* (1889) 23 Q B D 45 272 O A (where the magistrate also ordered the arrest of the supposed offender) see S O (1889) 5 T L R 218 as to burden on plaintiff to put in depositions see also *Leigh v Webb* (1800) 3 Esp 165 *Elses v Smith* (1822) 1 Dow & Ry (K B) 97 As to putting in the information see *Gregory v Derby* (1839) 8 O & P 749 *Stevens v Clark* (1842) Car & M 509 and p 871 *ante*

(b) See *Cooper v Booth* (1785) 3 Esp 135 144 cited in argument as *Boot v Cooper* in *Johnstone v Sutton* (1786) 1 Term Rep 510 530 Ex Ch. *Elses v Smith supra* *Mensworth v Fowkes* (1833) 4 B & Ad 449, *Wyatt v White, supra* see also *Anon.* (1808) 2 Keny 372

**SECT. 6.  
Malicious  
Procure  
ment of  
Issue of  
a Search  
Warrant.**

for a search warrant, being finally granted on *ex parte* information, belongs to the class of proceedings which are incapable of terminating in the plaintiff's favour (c). For the purpose however, of establishing absence of reasonable and probable cause, it must be shown that the search has proved fruitless (d).

**SECT. 7—Damages**

Damage  
which must  
be proved.

**1470** To support an action for malicious prosecution or other malicious legal proceedings one of three heads of damage must be proved if not implied by law

(i) Damage to a man's fame as where the matter of which he is accused is scandalous,

(ii) Damage done to the person, as where his life limb or liberty is endangered or

(iii) Damage to his property as where he is put to the expense of acquitting himself of the crime with which he is charged (c). Where two or more are indicted for a conspiracy and setting up a common defence are acquitted one of them who has paid the

(c) See p 679 *ante*

(d) As to malice see pp 679 684 *ante*. An application in the first instance for separate search warrants against two different persons in respect of one thing suspected to be stolen does not necessarily show malice (*Utting v Tierney* (1888) 51 J R 39). As to reasonable and probable cause see pp 680 685 *ante*. A reasonable suspicion of larceny disclosed by the information is sufficient to justify a magistrate in issuing a search warrant. There need not be a positive averment that goods have been stolen (*Lisee v Smith* (1822) 1 Dow & Ry (K B) 97 followed in *Jones v German* [1896] 2 Q B 418 affirmed [1897] 1 Q B 374 C A) nor need the information refer to specific goods (*Jones v German supra*). See also titles CRIMINAL LAW AND PROCEDURE Vol IX pp 307—310. MAGISTRATES p 592 *ante*. A constable is not liable in damages for acting in obedience to a search warrant unless upon a written demand upon him for a perusal and copy of the warrant he refuses or neglects for six days to comply with the same (Constables Protection Act 1750 (24 Geo 2 c 44) s 6) and see title POLICE. As to protection of magistrates and constables acting in intended pursuance of a public duty see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS. As to the constable's liability for acting in excess of the authority of the warrant see *Hoye v Bush* (1840) 1 Man & G 775 (arrest of wrong person). *Croser v Cundey* (1827) 6 B & C 232 (seizure of wrong goods). As the warrant need not specify the goods suspected of having been stolen (*Jones v German supra*) a constable authorised to search for and seize e.g. stolen sugar in a certain warehouse will not be liable if he also seizes there sugar which has not been stolen (*Price v Messenger* (1800) 2 Bos & P 158 and see title TRESPASS). Before an action is brought a demand for a perusal and copy of the warrant must be made (*Price v Messenger supra*).

(e) *Savile v Roberts* (1698) 1 Ld Raym 314. *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q B D 674 683 689 C A and see Buller Law of Nisi Prius 6th ed p 13. In *Savile v Roberts supra* at p 381 it was also held that where an indictment was ignored which did not contain matter of scandal or danger to person life limb or liberty but which caused expense, an action would not lie. But this decision has not been followed (*Jones v Guynn* (1714), 10 Mod Rep 148 214. *Smith v Hizon* (1734) 2 Stra 977). Where an indictment (for assault) which did not affect the plaintiff's reputation was ignored and the plaintiff in an action for malicious prosecution did not prove that he was put to expense he was non suited (*Byrne v Moore* (1813) 5 Taunt 187. *Freeman v Arkell* (1823) 8 Dow & Ry (K B) 669 compare *Quartz Hill Gold Mining Co v Eyre, supra* at p 681). Damage is also an essential element in an action for malicious abuse of civil process see p 689 *post*.

costs of the defence may, it seems, recover them as damages in an action for malicious prosecution (*f*)

SECT 7  
Damages

## Part II — Malicious Abuse of Civil Proceedings

### SECT 1—*In General*

**1471** The law allows every person to employ its process for the purpose of trying his rights without subjecting him to any liability unless he acts maliciously and without probable cause (*g*). There are however certain civil proceedings involving an interference with liberty or property or affecting or likely to affect reputation (*h*) for which when undertaken maliciously and without reasonable and probable cause (*i*), an action lies analogous to the action for malicious prosecution. In all such cases the rule that proof of damage actual or implied by law is essential to the cause of action applies, as well as in actions for malicious prosecution properly so called (*k*), and, when the complaint relates to civil proceedings this rule derives additional importance from the fact that the extra costs incurred in resisting such proceedings, beyond the party and party costs allowed by the court are not such damages as will support an action (*l*).

Remedy analogous to an action for malicious prosecution.

(*f*) *Roulands v Samuel* (1817) 11 Q. B. 39. *Aliter* if the defences are distinct in which case he could only recover a proportion of the costs (*ibid*). Damages which are too remote cannot be recovered (*Hoey v Felton* (1861) 11 C. B. (N. S.) 142 compare also *Haddan v Lott* (1854) 15 C. B. 411). As to aggravation of damages by persisting in the charge after action see *Warwick v Foulkes* (1844) 12 M. & W. 507. As to damages against several defendants, see *Brown v Allen* (1802) 4 Esp. 108. *Eliot v Allen* (1845) 1 C. B. 18 (trespass) and see generally title DAMAGES Vol. X. pp. 308 *et seq*.

(*g*) *De Medina v Grose* (1847) 10 Q. B. 172 Ex. Ch. *per* WILDE C.J. at p. 176.

(*h*) *Savile v Roberts* (1698) 1 Ld. Raym. 374 318 and see the text *infra* and pp. 690 691 692 *post*. The statement in the text refers only to proceedings in due form of law for the abuse of which the plaintiff's remedy is in the nature of an action on the case see p. 676 *ante*. If the proceedings complained of were wholly void or illegal an action of trespass will lie for an interference with person or property under cover of them and malice need not be alleged or proved see p. 691 *post* and see p. 671 *ante* and see title TRESPASS.

(*i*) As to the evidence and the functions of judge and jury in regard to malice and reasonable and probable cause see p. 680 *ante* and p. 691 *post*.

(*k*) *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q. B. D. 674 C.A. *per* BOWEN L.J. at p. 688 and see p. 688 *ante*. There are some cases in which damage is necessarily involved *e.g.* where a petition is maliciously presented to wind up a company at least a trading company for the presentation of such a petition must injure the credit of the company (*ibid* at pp. 691—693), or where the proceedings affect or endanger a man's liberty (*ibid* at pp. 683 689 citing *Savile v Roberts supra* and see note (*r*) p. 694 *post*) or result in the detention of goods (*The Walter D. Wallat* [1893] P. 202 207, applying *Chandler v Douilton* (1855) 3 H. & C. 553 (excessive distress)).

(*l*) See *Purton v Honnor* (1798) 1 Bos. & P. 205, *Hathaway v Barrow* (1807) 1 Camp. 151, *Syclair v Eldred* (1811) 4 Taunt. 7 (malicious arrest) *Webber v Nicholas* (1826) Ry. & M. 419, *Jenkins v Buddulph* (1827), 4 Bing. 160,

## SECT 1

## In General

Effect of rule  
as to damages

**1472** As a consequence of the above rule as to damages it has been laid down broadly that the bringing of an ordinary civil action, although it is brought maliciously, and without reasonable or probable cause, will not support an action by the person sued, against the plaintiff for maliciously bringing the first action (*m*). The reason given for this proposition is that such an action cannot cause legal damage either to person, fame or property because if the malicious action is tried in public the fame of the defendant will be cleared if it deserves to be cleared while if the action is not tried, his fame will not be assailed. Again such action involves no damage to his person and as to his property, the court by its judgment will give him such costs as he is entitled to (*n*).

Proceedings  
in name of  
third person

**1473** The weight of authority favours the view that apart from the law of champerty and maintenance (*o*), an action will lie against

*Grace v Morgan* (1836) 2 Bing (N o) 534 (vexatious and excessive distress see title DISTRESS Vol XI p 204) *Cotterell v Jones* (1851) 11 C B 713 (where A. and B conspired to bring an action in the name of C against D and there was a nonsuit without any order as to costs, *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q B D 674 C A see also *Cochburn v Edwards* (1881) 18 Ch D 449 459 462 compare *Sandhu v Thomas* (1816) 1 Stark 306 *Gould v Barratt* (1938) 2 Mood & R 111 (which in view of the above cases and notwithstanding the dictum of MARTIN B in *Houard v Lovegrove* (1870) L R 6 Exch 43 must now be considered as overruled) Under the old procedure there were cases (e.g. writs of error) in which it was not the practice to award costs and it was said that if such proceedings were vexatiously prosecuted the full costs might be recovered as damages in a subsequent action (see *Grace v Morgan supra* at p 537 *Doe v Fulliter* (1844) 13 M & W 47 50) Under the existing practice there is it is believed no case other than pauper cases where special precautions are taken against vexatious actions (see R S C Ord 16 r 24) in which taxed costs may not be awarded to a successful defendant (see R S C Ord 60 r 1 Judicature Act 1890 (33 & 34 Vict c 44) s 50 and title PRACTICE AND PROCEDURE) Where costs and expenses are voluntarily and unnecessarily incurred they are not recoverable (*Bieten v Burrulge* (1811) 3 Camp 139 where plaintiff who had received notice that a warrant was out for his arrest but immediately afterwards was told that there was a mistake and that he need not pay any attention to the warrant notwithstanding which he put in bail and paid the bailiff was nonsuited).

(*m*) *Quartz Hill Gold Mining Co v Eyre supra per* BOWEN L J at pp 689 690 Early cases however appear to favour the right to bring such action where special damage could be proved see *Waterer v Freeman* (1617) Hob 205 266 267 If a man sue me in a proper court yet if his suit be utterly without ground of truth and is certainly known to himself I may have an action on the case against him for the undue vexation and damage that he putteth me to by his ill practice see also *Atwood v Munger* (1653) Sty 378 and in *Savile v Roberts* (1698) 1 Ld Raym 374 relied on by the court in *Quartz Hill Gold Mining Co v Eyre supra* it was held that if a man fancies he has a right against another he may bring a civil action But if the action is one of mere vexation the person sued cannot bring an action for damages merely because the first action was brought maliciously he must prove some special damage e.g. that he was held to excessive bail As to these two cases see *Wren v Weild* (1869) L R 4 Q B 730 736

(*n*) *Quartz Hill Gold Mining Co v Eyre supra per* BOWEN L J at p 690 The statement in the text was not necessary for the decision of the case and it is submitted that the first of the above reasons is not universally applicable Serious damage might be caused to a person by the publication in interlocutory proceedings, or in the course of a long trial, of injurious allegations which he would have no immediate opportunity of contradicting

(*o*) See title ACTION, Vol. I. p 51

one who maliciously, and without reasonable and probable cause, puts the law in motion in the name of a third person, who is unable to pay the taxed costs of the litigation (p)

NOTE 1  
In General

1474 In an action for the abuse of civil proceedings the plaintiff has to allege and prove a case similar, *mutatis mutandis*, to that of a plaintiff in an action for malicious prosecution (q)

Matters which the plaintiff must prove.

In the first place malice must be alleged and proved (a), except in cases where the proceedings were wholly void or illegal (b)

(p) *Fvaz v Nicholls* (1846) 2 O B 501 *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) 2 App Cas 186 201 P O approving *Cotterell v Jones* (1851) 11 O B 713 per WILLIAMS J at p 730 Assuming the costs to constitute legal damage the only measure of such damage is the costs ascertained by the usual course of law (*ibid* per ALFOURD J at p 731 (i.e. by taxation)). In the two last mentioned cases conspiracy was alleged but although the malicious action would be liable to be stayed if brought without the plaintiff's consent it does not appear from the *dicta* above referred to that assuming legal damage to be sufficiently established conspiracy is a necessary element in the cause of action see *Pechell v Watson* (1841) 8 M & W 691 *Flight v Leman* (1843) 4 Q B 883 It is clear however that both malice and absence of reasonable and probable cause must be proved (S CO and see *Davies v Jenkins* (1843) 11 M & W 745 756)

(q) *Daniels v Fielding* (1846) 16 M & W 200 207 Most of the cases presently to be cited illustrating this were decided of course before the Debtors Act 1869 (32 & 33 Vict c 62)

(a) *Scheibel v Fairbairn* (1799) 1 Bos & P 388 (arrest not countermanded after payment but no malice alleged) see *Page v Wyle* (1803) 3 East 314 *Gibson v Chaters* (1800) 2 Bos & P 129 (arrest on an *alias writ* action failed as plaintiff sued in case and not in trespass and failed to prove malice) *Sinclair v Eldred* (1811) 4 Taunt 7 *Spencer v Jacob* (1828) Mood & M 180 *George v Radford* (1828) 3 O & P 464 *Stokes v White* (1834) 1 Cr M & R 223 *Gibbs v Pike* (1842) 9 M & W 351 (registration under the Judgments Act 1838 (1 & 2 Vict c 110) s 19) *Horsley v Style* (1893) 9 T L R 605 O A (registering document erroneously alleged to be a bill of sale) *Dummark v Bowley* (1857) 2 O B (N s) 542 (filing after payment judge's order for payment of debt) *De Medina v Grove* (1847) 10 Q B 152 172 Ex Oh *Clissold v Cratchley* [1910] 1 K B 374 reversed [1910] 2 K B 244, O A on the ground that the action was one of trespass (issue of execution after payment) *Drummond v Pigou* (1835) 2 Bing (N c) 114 (outlawry for debt) *Saxon v Castle* (1837) 6 Ad & El 652 (arrest for more costs than were due but malice not alleged) *Lorter v Weston* (1839) 5 Bing (N c) 715 (causing without malice plaintiff to be rendered in discharge of his bail) *Jackson v Burleigh* (1799) 3 Esp 34 (arrest without malice for more than £10 when less than £10 was afterwards accepted) *Turner v Turner* (1818) Gow 20 (conspiracy in issuing a commission of lunacy) *Tebbutt v Holt* (1844) 1 Car & Kir 280 *Daniels v Fielding supra* (arrest procured by false affidavit) *Moore v Gardner* (1847) 16 M & W 590 *Tozer v Child* (1857) 7 L & B 377 Ex Ch *Gibson v Veasey* (1867) 15 L T 586 *Mitchell v Jenkins* (1833) 5 B & Ad 588 (want of reasonable and probable cause evidence of malice) As to malicious detention see *Crozer v Pulling* (1820) 4 B & C 26 *Moore v Gardner supra* As to malicious issue of writ of extent see *Craig v Hasell* (1843) 4 Q B 481 As to liability of solicitor see *Crozer v Pulling supra* *Stockley v Hornidge* (1837) 8 O & P 11 *Johnson v Emerson* (1871) L R 6 Exch 329 and title SOLICITORS As to refusing tender of debt see *Crozer v Pulling, supra* *Drury v Hounsfield* (1839) 11 Ad & El 98

• Discontinuance of former proceedings by defendant would be evidence of malice (*Nicholson v Coghill* (1825), 4 B & C 21) not so mere failure to carry them on (*Sinclair v Eldred, supra* *Webb v Hall* (1828) Mood & M 253)

(b) *Barker v Braham* (1773) 3 Wils 368 *Bates v Pulling* (1826) 6 B & C 38, *Clissold v Cratchley, supra* see also p 692 post

**SECT 1**  
**In General.** Again the plaintiff must allege and prove that the defendant acted without reasonable and probable cause (c), and either that the entire proceedings against him have terminated in his favour (d), or that the particular process complained of has been superseded or discharged (e)

Proceedings  
 need not so  
 terminate if  
 not capable of  
 so termi-  
 nating

It is not, however, necessary that the termination of the proceedings should have been in the plaintiff's favour if from their nature they were incapable of so terminating (f) nor if the plaintiff makes no complaint of the proceedings in an action conducted to judgment, but complains of the defendant's proceedings in enforcing the judgment for example by levying execution for an excessive amount (g) Further where the arrest or other proceeding complained of was an abuse of the process of the law to effect an object not within the scope of such process, neither want of reasonable and probable cause (h), nor termination of the proceedings in the plaintiff's favour (i), is an essential element in his case

( ) *Dronefield v Archer* (1822) 5 B & Ald 513 *Austin v Debnam* (1824) 3 B & O 139 (admitted set off not taken into account by plaintiff) over ruling *Brown v Pigeon* (1811) 2 Camp 594 *Brook v Carpenter* (1825) 3 Bing 297 *Daniels v Fielding* (1846) 16 M & W 200 *Roret v Lewis* (1848) 5 Dow & L 371 (ca sa against person under protection of bankruptcy order) *Wentworth v Bullen* (1829) 9 B & O 840 *Stevenson v Neunham* (1853) 13 C B 285 Ex Ch (distraining for more rent than was due), *Gibson v Veasey* (1867) 15 L T 586 see also *Goslin v Wilcock* (1766) 2 Wils 302 *Smith v Cattel* (1768) 2 Wils 376 (holding to bail where court had no jurisdiction) *Whalley v Pepper* (1836) 7 C & P 506 (probable cause for action but technical defect) *Riddell v Pakeman* (1835) 2 Cr M & R 30 (affidavit of debt irregular) In *Daniels v Fielding supra* at p 207 the court seemed to be of opinion that if a plaintiff fairly placed the facts before a judge and the judge thereupon ordered an arrest the plaintiff though he did not believe that the defendant was about to quit England would not be responsible for the arrest But as to this compare *Johnson v Emerson* (1871) L R 6 Exch 329 340 352 353 *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q. B D 674 684 C A *Bank of British North America v Strong* (1876) 1 App Cas 307 316 P O *Mitchell v Jenkins* (1833) 5 B & Ad 588 see also *Ross v Norman* (1850) 5 Exch 359 *Nevill v Loadman* (1860) 2 F & F 313 *Melia v Neate* (1863) 3 F & F 757 As to evidence of malice and want of reasonable and probable cause see pp 684 685 ante and note (j) p 693 post

(d) *Waterer v Freeman* (1617) Hob 205 266 *Parker v Langly* (1714) 10 Mod Rep 145 209 *Brustow v Heywood* (1815) 1 Stark 48 *Brandt v Peacock* (1823) 1 B & O 649 *Whitworth v Hall* (1831) 2 B & Ad. 695 698 *Brook v Carpenter* (1825) 3 Bing 297 (where the proceedings were stopped by a rule of court) *Combe v Capron* (1834) 1 Mood. & R 398 *Nicholson v Coghill* (1825) 4 B & O 21 *Watkins v Lee* (1839) 5 M & W 270 (where the proceedings were discontinued) *Arundell v White* (1811) 11 East 216 see also *Wilkinson v Howel* (1830) Mood & M 495 (set process by consent not a sufficient termination) compare *Kirk v French* (1794) 1 Esp 80 *Norrish v Richards* (1835) 3 Ad. & El 733 at p 737 *Parton v Hall* (1864) 12 W R. 753 (foreign attachment)

(e) *Lees v Patterson* (1878) 7 Ch D 866 (writ *ne exeat regno* not set aside before action) *Gibson v Veasey* (1867), 15 L T 586 (action not terminated, but plaintiff discharged from custody)

(f) See and compare *Steward v Gromett* (1859), 7 O B (N S) 191 and p 679, ante

(g) *Golding v Eyre* (1821) 10 O B (N S) 592 (ca sa. for more than remained due on the judgment plaintiff paid the amount wrongly demanded and then sued)

(h) *Grainger v Hall* (1838) 4 Bing (N O) 212

(i) *Grainger v Hall, supra* (where the object was to extort certain property to

**1475** As in the case of malicious prosecution, the burden of proof in respect of everything that goes to make up his cause of action rests primarily on the plaintiff (j)

**SECT 1.**  
**In General.**  
Burden of proof

**SECT 2—Malicious Arrest of Person on Civil Process**

**1476** Actions for malicious arrest on civil process (k) are now rarely brought for in the first place, arrest for non payment of a judgment debt or other sum ordered to be paid can only take place by the order of a judge, on satisfactory proof that the person in default has or has had since the date of the judgment or order the means to pay the sum in respect of which he is in default and has refused or neglected, or refuses and neglects, to pay it (l)

When such arrest can take place.

**1477** Again the power to arrest on *meane process* (m) is now abolished (n) but notwithstanding (o) if a plaintiff in an action in the High Court before final judgment satisfies a judge that he has a good cause of action against the defendant to the extent of at least £50, and that there is probable cause for believing that the defendant is about to quit England and that his absence will materially prejudice the plaintiff (p) the judge may order the defendant to be arrested for a period not exceeding six months, unless he gives security that he will not go out of England without the leave of the court (q)

which defendants were not entitled) *Waterer v Freeman* (1617) Hob 203, 266 and see *Heywood v Collinge* (1838) 9 Ad & El 268 *Parton v Hill* (1864) 12 W R 753 754 *Mayer v Walter* (1870) 64 Pennsylvania State Reports 283 see also cases cited in note (b) p 691 *ante*

(j) See p 683 *ante* Discontinuance though sufficient evidence of termination of the action is not evidence of malice or want of cause (*Bristow v Heywood* (1815) 1 Stark 48 and see *Brook v Carpenter* (1825) 3 Bing 297 *Watkins v Ives* (1839) 5 M & W 270 *Arundell v Hite* (1811) 14 East 216 *The Cullin-grove The Numida* (1885) 10 P D 158 161) As to the functions of judge and jury see p 680 *ante*

(k) As to what amounted to an arrest under the old practice see *Berry v Adamson* (1821) 6 B & C 528 *Webb v Hill* (1828) Mood & M 253 *Grainger v Hill* (1838) 4 Bing (N C) 212 (plaintiff must have been if not actually arrested under restraint) see also *Lloyd v Harris* (1792) Peake 231 [174]

(l) Debtors Act 1869 (32 & 33 Vict c 62) s 3 see title BANKRUPTCY AND INSOLVENCY Vol II p 339

(m) *I.e.* any process between primary and final primary process being the writ of summons and final process being the writ of *ca sa* or execution see Wharton's Law Lexicon

(n) Debtors Act 1869 (32 & 33 Vict c 62) s 6

(o) The Judgments Act 1838 (1 & 2 Vict c 110) s 1 abolished arrest on *meane process* with certain exceptions mentioned in the Act For the state of the law on this point before and after that Act see *Daniels v Fielding* (1846) 16 M & W 200 205—207

(p) *I.e.* that the plaintiff will be prejudiced in the prosecution of the action not in obtaining the fruits of it (*Yorkshire Engine Co v Wright* (1872) 21 W R 15) After judgment the order of arrest with all its incidents is annulled (*ibid* *Hume v Druryff* (1873) L R 8 Exch 214) The power to order arrest is discretionary (*Hasluck v Lehman* (1890) 6 T L R 435 C A)

(q) Debtors Act 1869 (32 & 33 Vict c 62) s 8 This only applies to actions in which if brought before the commencement of the Act the defendant would have been liable to arrest (*ibid*) Where the action is for a penalty or sum in the nature of a penalty (other than a penalty in respect of a contract) the security given is, not that the defendant will not go out of England, but that any sum



**SECT 2**  
**Malicious**  
**Arrest of**  
**Person on**  
**Civil**  
**Process**

Arrest under  
 writ *ne exeat*  
*regno*

As in other actions for abuse of legal procedure, damage should be alleged, and, where not implied by law, proved, in an action for malicious arrest on civil process (r) Proof of malice and of the want of reasonable and probable cause is as appears above, necessary (s)

**1478** Writs *ne exeat regno* may still be issued and it would seem that one who maliciously and without reasonable and probable cause, procures the arrest of another under such a writ may be liable to an action (t)

recovered in the action shall be paid or that the defendant shall be rendered to prison In this case the plaintiff need not prove that defendant's absence from England will materially prejudice him in prosecuting his action (*ibid*) As to the practice see R S O Ord 69

(r) See and compare *Churchill v Siggers* (1854) 3 E & B 929 *Jennings v Florence* (1857) 2 C B (N S) 467 In these cases the court held that it was necessary for the plaintiff to allege special damage In each case the defendant having recovered judgment was entitled to a writ of *ca sa* but having received part of the judgment debt otherwise than from the plaintiff he wrongfully procured a writ for the whole amount The plaintiff had to show as special damage that by reason of his arrest and detention for the larger sum his imprisonment was prolonged or the expense of obtaining his discharge increased But generally on its being shown that the plaintiff has been unjustifiably deprived of his liberty special damage need not be proved for the law in that case implies some damage see *Savile v Roberts* (1698) 1 Ld Raym 374 *Quartz Hill Cold Mining Co v Eyre* (1893) 11 Q B D 674 683 C A see p 688 *ante*

(s) See notes (a) and (c) pp 691 692 *ante* see also *Spencer v Jacob* (1828) Mood & M 180 action on the case not maintainable where by mistake and without malice the wrong person was arrested nor where in such circumstances he was sued to judgment and execution was put in (*Davies v Jenkins* (1843) 11 M & W 745) compare *Jarman v Hooper* (1845) 6 Man & G 827 where trespass lay for an execution against the goods of a person who was not the judgment debtor As to termination of proceedings see notes (d) (e) (f) (g) p 692 *ante* Notwithstanding the change in the law effected by the Debtors Act 1869 (32 & 33 Vict c 62) s 6 (see the text *supra*) the following cases may be usefully referred to as being cases in which claims were made for maliciously and without reasonable and probable cause arresting a debtor on final process or for detaining him in prison after tender or payment of the full amount of the debt and costs — *Crozer v Pilling* (1825) 4 B & O 26 (refusal to accept payment of debt and costs tendered after arrest is *prima facie* evidence of malice) but the evidence may be rebutted as in *Hounsfield v Drury* (1839) 11 Ad & El 98 *Lewis v Morris* (1834) 2 Cr & M 712 (arrest under concurrent writ of *capias* after payment made under another writ but no malice shown) *Telbutt v Holt* (1844) 1 Car & Kir 280 (arrest on a *capias* after satisfaction of the judgment by a co-defendant arrested on a concurrent writ) *Wentworth v Bullen* (1829) 9 B & O 840 (action lay for arrest on a *capias* indorsed to levy more than was due under the terms of a cognovit) and see as to this *Saxon v Castle* (1837) 6 Ad & El 602 *Churchill v Siggers supra* *Jennings v Florence supra* *Gildang v Eyre* (1861) 10 C B (N S) 592 see *Moore v Gardner* (1847) 16 M & W 290 (refusing after payment to assent to release of person attached for non payment of costs but no malice proved) Again no action lay for mere nonfeasance without malice see *Scheibel v Fairbairn* (1899) 1 Bos & P 388 (writ of *capias* sued out before payment and not countermanded by creditor after payment) *Page v Wiple* (1803) 3 East 314 see also *Phillips v General Omnibus Co* (1880) 50 L J (Q B) 112 (in the absence of malice no action for failure to withdraw the sheriff on creditor becoming bound by a statutory composition offered by the debtor) In all such cases as those above mentioned when an action lies, the solicitor of the creditor as well as his client if malice is alleged and proved against him may be liable in damages (*Crozer v Pilling supra*) and see title SOLICITORS

(t) See *Bank of British North America v Strong* (1876), 1 App Cas 307 P O Semble a writ *ne exeat regno* will only be granted in cases which come within the Debtors Act, 1869 (32 & 33 Vict c 62) s. 6, p 693, *ante* (see *Drover v Beyers*

### SECT 2 Malicious Arrest of Person on Civil Process

**1479** A person privileged from arrest by reason of his having been ordered as a witness to attend a court or by reason of any other order, cannot, if arrested, recover damages though the arrest was made maliciously and with knowledge of the privilege (*a*) The privilege is that of the court which made the order (*v*) and the remedy is to apply to the court for release (*a*)

Arrest of  
privileged  
persons

**1480** In an action for malicious arrest, time runs from some act of the defendant in putting the law in motion not from the expiration of an imprisonment under the order of a judicial authority (*b*)

From what  
event time  
runs

**1481** A solicitor who, knowing that there is no debt due to his client by the plaintiff maliciously and without probable cause procures the plaintiff's arrest may be personally liable therefor (*c*)

Liability of  
solicitor

### SECT 3—Malicious Execution

**1482** Interference with property by process of execution is much more common than arrest of the person. An action may be brought for the abuse of such process in support of which the plaintiff must be prepared as in actions for malicious prosecution with proof of malice and of the absence of reasonable and probable cause (*d*)

Application  
and nature of  
remedy

Where the judgment has not been fully satisfied and the judgment debtor complains of the execution thereunder his remedy is an action in the nature of an action on the case and he must prove malice and the absence of reasonable and probable cause (*e*)

(18.9) 13 Ch D 242 C A *Haris v Hands* (1851) 43 L T 750 (in the former case the Court of Appeal refused the writ on the ground that the debt was a mere legal demand) There must be a debt presently payable (*Coherson v Bloomfield* (1880) 29 Ch D 341 C A) and the evidence of intention to leave England must be clear (*he Underwood & Lewis v W* (1903) 51 W R 35 see also *Sobey v Sobey* (1973) L R 15 Lq 200 *Iees v Iatterson* (1878) 7 Ch D 866 R S C Ord 69) As to arrest of debtor in bankruptcy see Bankruptcy Act 1863 (46 & 47 Vict c 52) s 25 as amended by the Bankruptcy Act 1890 (53 & 54 Vict c 71) s 7 see also title BANKRUPTCY AND INSOLVENCY Vol II pp 55 75

(*u*) *Magnay v Burt* (1843) 5 Q B 381 1 x Ch (where witness was arrested on returning from an examination ordered by the court) *Yearsley v Heane* (1840) 14 M & W 322 (arrest after protection order made under Insolvent Debtors Act 1842 (5 & 6 Vict 116) s 4)

(*v*) *Magnay v Burt supra*

(*a*) *Ibid* *Yearsley v Heane supra* see also *Watson v Carroll* (1839) 4 M & W 592 *Phillips v Naylor* (1858) 3 H & N 14 affirmed (1859) 4 H & N 560 Lx Ch The remedy if any for continued detention after an order for release would appear to be an action for trespass (*Magnay v Burt supra*)

(*b*) *Violet v Sympton* (1857) 8 L & B 344 (detainer under the old practice in bankruptcy proceedings)

(*c*) *Stocley v Hornidge* (1837) 8 C & P 11 see also *Crocker v Pilling* (1825) 4 B & C 26 and title SOLICITORS As to evidence that arrest was made at instance of defendant see title EVIDENCE Vol XIII see also *Arundell v White* (1811), 14 East 16 224 *Crook v Dowling* (1822) 3 Doug (K B) 70 *Casburn v Reid* (1818) 2 Moore (C P) 60 *Petrie v Lamont* (1842) 3 Man & G 702 707

(*d*) For examples of cases in which the action lies and of those in which the remedy is in the nature of trespass see title EXECUTION, Vol XIV pp 26 *et seq* and the cases there cited see also *Gough v Crabb* (1843) 11 M & W 497 and the cases referred to in note (*s*) p 694 *ante*

(*e*) See *Clasold v Cratchley* [1910] 2 K B 244 *Churchill v Siggers* (1854) 3 E & B 929, *Jennings v Florence* (1857), 2 Q B (N S) 467, compare, however,

**SECT 3.**  
**Malicious**  
**Execution.**

If payment or part payment of a debt has preceded a judgment for such debt an execution for the whole amount (regardless of such payment) will not be actionable unless the judgment is first set aside or rectified (f) •

**SECT 4—Malicious Presentation of Bankruptcy Petition**

Proof  
 required.

**1483** An action will lie against a person who procures an adjudication of bankruptcy to be made against another if it be alleged and proved

(1) That the proceedings in bankruptcy were taken maliciously (g),

*De Medina v Grove* (1847) 10 Q. B. 152 Ex Ch per WILDE CJ at p 176 commented on in *Churchill v Siggers* (1854) 3 E. & B. 929 939

(f) *Huffer v Allen* (1866) L. R. 2 Exch. 15 applied in *Turley v Daw* (1906) 94 L. T. 216 (no action against bailiff for false return of service of judgment summons, while committal order founded thereon stands) compare *Bynoe v Pink of England* [1902] 1 K. B. 467 C. A. (no action against witness for false evidence while plaintiff's conviction unreversed) and see titles ESTOPPEL Vol XIII pp 321 et seq. In *Huffer v Allen supra* the debt had been reduced by payment after writ issued and before judgment which was signed in default of appearance for the full amount for which a *ca sa* issued and the question was raised but not determined whether if the judgment had been rectified the plaintiff upon proof that the defendant had signed judgment and issued execution with knowledge of the payment and had acted maliciously and without reasonable and probable cause (*De Medina v Grove* (1847) 10 Q. B. 152 172 Ex Ch) could have maintained an action. It is submitted that he could and that as to the excess there would have been a sufficient termination of the former action in his favour. See the judgments of KELLY C. B. and PIGOTT B. in *Huffer v Allen supra* and compare *Hodges v Callaghan* (1851) 2 C. B. (N. S.) 306 *Gilding v Lyre* (1861) 10 C. B. (N. S.) 592 and cases cited in the preceding note. As to setting aside judgment see and compare *Hughes v Justin* [1894] 1 Q. B. 667 C. A. *Armitage v Parsons* [1908] 2 K. B. 410 C. A. and generally title JUDGMENTS AND ORDERS Vol XVIII.

(g) *Johnson v Emerson* (1871) L. R. 6 Exch. 329 344 Malice which is a question for the jury may be inferred from the absence of reasonable and probable cause (*Mitchell v Jenkins* (1833) 5 B. & Ad. 588 see p 684 ante) and there was evidence of malice where the proceedings were taken not to procure equal distribution of the debtor's assets but to coerce him into the admission of a debt (*Johnson v Emerson supra* at p 350). So there will be strong if not conclusive evidence of malice where the bankruptcy proceedings were an abuse of the process of the court or were taken for the purpose of extortion or of putting an improper pressure on the debtor e.g. where the object was to stay an action against a third person (*Re Kemp Ex parte Kemp* (1841) 1 Mont. D. & De G. 667) or, in violation of good faith to put an end to a valuable lease (*Re Gallimore Ex parte Gallimore* (1816) 2 Rose 424) or to dissolve a partnership between the petitioning creditor and the debtor (*Re Broune Ex parte Broune* (1810) 1 Rose 151 *Re Christie* (1833) Mont. & B. 329 351, *Re Johnson Ex parte Johnson* (1842) 2 Mont. D. & De G. 678 *Re Coulson Ex parte Phipps* (1844) 3 Mont. D. & De G. 505) or where there being no assets, the sole object was to defeat an action (*Re Bourne Ex parte Bourne* (1826) 2 Gl. & J. 137) see also *Re Davies, Ex parte King* (1876) 3 Ch. D. 461 C. A. (where a petition presented for the purpose of extorting money from the debtor was dismissed) *Re Adams Ex parte Griffin* (1879) 12 Ch. D. 480, C. A. (where petitioner purchased a debt so as to obtain an adjudication for a fraudulent purpose) *Owen v Lavery* (1900), 16 T. L. R. 375. But it seems that the existence of a mere bye motive, not affected with fraud will not render bankruptcy proceedings an abuse of the process of the court, and so the proceedings were not avoided where the object of the petitioning creditor was to get the bankrupt out of a firm with which the petitioner had extensive dealings, there being no fraud on the part of the peti-

(u) that they were taken without reasonable and probable cause (h), and

(ui) that the adjudication has been annulled (i)

If a man, by evidence false in fact, maliciously and without reasonable and probable cause, procures an adjudication in bankruptcy, it will be no answer to an action for damages brought after annulment that even if the evidence were true an adjudication could not have been properly made (k)

SECT 4  
Malicious  
Presenta-  
tion of  
Bankruptcy  
Petition.

**1484** With regard to damages, an adjudication of bankruptcy, as tending to injure or destroy credit, necessarily involves damage at all events in the case of a trader (l). It seems probable that the same rule would apply in the case of a non trader (l)

Damages

Whether an action will lie without special damage for the presentation of a malicious and unfounded bankruptcy petition which has been dismissed is not clear, but such an action will not be summarily stopped as frivolous and vexatious (m)

Special  
damage

**1485** A solicitor who procures an adjudication of bankruptcy on behalf of a client may himself if he has acted maliciously and without reasonable and probable cause, be liable in an action for damages when the adjudication has been annulled (n)

Liability of  
solicitor

#### SECT 5—Malicious Presentation of Winding up Petition

**1486** The presentation maliciously and without reasonable and probable cause of a petition to wind up a company at all events if it be a trading company, will on the dismissal of the petition give a cause of action though no pecuniary loss or special damage has been suffered. In such a case the advertisement and hearing of the petition must necessarily injure the reputation and credit of the company (o)

Winding up  
petition

tioner or concert with the other partners (*Re Wilbeam Ex parte Wilbeam* (1870) Buck 469 sub nom *Re Wilbran Ex parte Wilbran o Madd* 1 approved in *King v Henderson* [1898] A C 720 P C) and see *Re Christie* (1833) Mont & B 329 331 and title BANKRUPTCY AND INSOLVENCY Vol II pp 60 157

(h) *Whitworth v Hall* (1831) 2 B & Ad 695 approved in *Metropolitan Bank v Pooley* (1880) 10 App Cas 210 As to evidence of want of reasonable and probable cause see p 680 ante see also *Cotton v James* (1830) 1 B & Ad 128 *Hay v Weakley* (1832) 5 C & P 361 (annulment of adjudication not sufficient evidence) *Johnson v Emerson* (1871) L R 6 Exch 329 331 352 353 *Cox v English Scottish and Australian Bank* [1905] A C 168 P C

(i) See cases cited at the beginning of note (h) supra see also *Matthews v Dickinson* (1817) 7 Taunt 399 The action may lie though the bankruptcy statute gives another remedy (*Chapman v Pickersgill* (1762) 2 Wils 145 *Brown v Chapman* (1763) 3 Burr 1418)

(k) *Farley v Danks* (1855) 4 L & B 493 *Johnson v Emerson supra* at p 341 see also *Quartz Hill Gold Mining Co v Eyre* (1883) 11 Q. B D 614 684 C A

(l) *Johnson v Emerson supra*, at p 340 *Quartz Hill Gold Mining Co v Eyre, supra* at pp 684 691 *Savile v Roberts* (1698) 1 Ld Raym 374 378 see p 689 ante, *Wyatt v Palmer* [1899] 2 Q. B 106 C A

(m) *Wyatt v Palmer supra* It should be noted that bankruptcy petitions are heard in chambers and not in open court, as winding up petitions are. In the case of the latter, too the hearing of the petition is advertised beforehand. See and compare *Quartz Hill Gold Mining Co v Eyre supra* at p 685

(n) *Johnson v Emerson supra*, at p 333

(o) *Quartz Hill Gold Mining Co v Eyre, supra*, and see title COMPANIES,

## SECT 6.

Malicious  
Arrest of a  
ShipAdmiralty  
processDamage  
implied.SECT 6—*Malicious Arrest of a Ship*

**1487** An action lies against one who, maliciously and without reasonable and probable cause procures by means of Admiralty proceedings the arrest of a ship if the ship has been released and the proceedings have terminated in favour of the person aggrieved by the arrest (*p*)

In such a case damage is implied by law, and no actual or special damage need be proved the plaintiff, if he succeeds, being entitled to at least nominal damages (*q*)

In cases where at least actual damage has been sustained the Admiralty Court will not if the facts are properly brought to its knowledge which may be done by affidavit (*a*) put the injured party to the necessity of bringing a fresh action, but will, in the original action, award him damages for the wrongful arrest (*b*) usually in the nature of demurrage (*c*)

SECT 7—*Other Malicious Proceedings*Other  
proceedings  
Registration  
of judgments

**1488** The principles already discussed have been applied in other cases when the abuse of civil proceedings has been alleged Thus, the improper registration under the Judgments Act 1838 (*d*) of a

Vol V p 399 It is submitted that the proposition in the text applies also to non trading companies whose credit must be injured by a petition The judgment of BREIT MR in *Quartz Hill Gold Mining Co v Fyre* (1883) 11 Q B D 674 C A at p 685 seems wide enough to include them As to special damage the liability to pay extra costs would not be sufficient (*ibid* see also *Cotterell v Jones* (1951) 11 O B 113) As to malice see p 6,9 *ante* As to absence of reasonable and probable cause see p 680 *ante* *Quartz Hill Gold Mining Co v Fyre* *supra* at pp 687 693

(*p*) *Redway v McAndrew* (1873) 11 Q B 74 *The Strathnaver* (1876) 1 App Cas 58 67 P C *The Collingrove* (1885) 10 P D 158 *The Walter D Wallat The Numula* [1893] P 202 see p 677 *ante* *Munce v Blacl* (1858) 7 E O L R 415 *Castrique v Behrens* (1861) 3 F & E 709 (termination of proceedings in plaintiff's favour) As to practice in Admiralty see title ADMIRALTY Vol I pp 88 *et seq*

(*q*) *The Walter D Wallat* *supra*

(*a*) *The Collingrove The Numula* (1885) 10 P D 158 161

(*b*) *The Collingrove The Numula* *supra* at p 160 following *The Orion* (1852) Sw 378 n *The Evangelismos* (1858) Sw 378 381 P C approved in *The Strathnaver* *supra* and see *The Nautilus* (1856) Sw 105 *The Glasgow* (1856) Sw 145 (where the element of malice seems to have been wanting) From the language of the court in *The Collingrove The Numula* *supra* at p 161 it might be inferred that to entitle the owner of a ship to damages for horseless arrest it is enough to show something less than malice namely

that it was the result of gross negligence but a reference to the authority on which this language is founded shows that the negligence must be that *crassa negligentia* from which the law implies malice (*The Evangelismos* *supra*)

(*c*) *The Nautilus* *supra* *The Glasgow* *supra* Before November 1900 the amount of commission paid to procure bail for the release of a ship which had been maliciously and without cause arrested was recoverable as damages (*The Collingrove The Numula* *supra*) and even where the original proceedings terminated in the plaintiff's favour if the result showed that they had arrested the ship for an exorbitant sum for which they had required bail the court would award the defendants the costs and expenses of finding it (*The George Gordon* (1884) 9 P D 46) Under the present rules of court a commission or fee paid to a surety on a bail bond is recoverable on taxation (R S C, Ord 12 r 21 (*a*)) and see title ADMIRALTY Vol I p 90).

(*d*) 1 & 2 Vict. c 110, s. 19

judgment or order for the payment of money whereby the party against whom it has been obtained is prejudiced in disposing of his lands, is not actionable without proof of malice and want of reasonable and probable cause (e)

Again, in order to sustain an action for maliciously and without reasonable and probable cause procuring a foreign attachment to be issued out of the Mayor's Court of London (a process ancillary to an action in that court) to attach a debt alleged to be due from the plaintiff (the defendant in the original action) it would be necessary to show that that action had been determined in his favour (f)

SECT. 2.  
Other  
Malicious  
Proceedings

Process out of  
Mayor's  
Court.

**1489** If a man in good faith makes an unfounded claim, which, however he believes to be well founded, to the property of another he is not by reason thereof liable to an action though damage ensues (g). But he is liable to be sued for damages by the owner of the property if such claim has been made maliciously and without reasonable and probable cause and damage to the owner has resulted therefrom (h)

Unfounded  
claim to  
property

(e) *Gibbs v Pike* (1842) 9 M & W 351 where the question was raised whether the order could properly be registered under the Act

(f) *Parton v Hill* (1864) 12 W R 153 The process of foreign attachment though still valid has fallen into disuse since *London Corporation v London Joint Stock Bank* (1881) 6 App Cas 333 See title MAYOR'S COURT LONDON

(g) *Gerard v Dickenson* (1890) 4 Co Rep 18 *Loe'tt v Hebbert* (1616) 1 Roll Rep 409 *Hargrave v Le Breton* (1669) 4 Burr 2422 *Smith v Spooner* (1810) 3 Taunt 246 *Little v Donovan* (1813) 1 M & S 639 *Wren v Heald* (1869) 1 R 4 Q B 730 *Halsey v Brotherhood* (1881) 19 Ch D 386 C A

(h) *Green v Button* (1835) 2 Cl M & R 70 as to which compare *Allen v Flood* [1898] A C 135 See also the cases cited in note (g) *supra* As to claim of right see title FRESHIASS

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## MALTA

See DEPENDENCIES AND COLONIES

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## MANDAMUS

See CROWN PRACTICE, MAGISTRATES

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## MANOR

*See* COPYHOLDS , REAL PROPERTY AND CHATTELS REAL

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## MANORIAL COURTS

*See* COPYHOLDS , COURTS

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## MANSLAUGHTER

*See* CRIMINAL LAW AND PROCEDURE.

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## MAP

*See* EVIDENCE

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## MARGARINE

*See* FOOD AND DRUGS

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## MARINE INSURANCE.

*See* INSURANCE, SHIPPING AND NAVIGATION

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## MARINE STORES

*See* CRIMINAL LAW AND PROCEDURE, TRADE AND TRADE UNIONS

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## MARINERS

*See* CRIMINAL LAW AND PROCEDURE FISHERIES, MASTER AND  
SERVANT, SHIPPING AND NAVIGATION

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## MARITIME COURTS

*See* ADMIRALTY, COURTS, SHIPPING AND NAVIGATION

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## MARITIME LIEN

*See* LIEN, SHIPPING AND NAVIGATION

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## MARKET GARDEN.

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END OF VOL. XIX.

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